Criminal Proceedings

CHAPTER 4

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Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.1 Complaints and Warrants

MCR 6.101 The complaint

MCL 761.1(n) Definitions

MCL 764.1a Warrants; issuance; complaints

Criminal proceedings begin with an indictment or an information. MCL 767.1 *et seq*.; *People v Glass*, 464 Mich 266, 276–277 (2001). The basis of an information is a signed warrant and complaint. The complaint must state the substance of the alleged crime and reasonable cause to believe that the person named in the complaint is the person who committed the crime. MCL 764.1d; *Glass*, *supra*, 464 Mich at 277.

Before an information is filed, the person accused has a right to a preliminary examination to determine whether a crime has been committed and whether there is probable cause to believe that the person accused committed it. MCL 767.42; *Glass, supra*, 464 Mich at 277.

"A complaint is a written accusation that a named or described person has committed a specified criminal offense." MCR 6.101(A). The complaint must be signed and sworn to. MCR 6.101(B). "A complaint may not be filed without a prosecutor's written approval . . . or unless security for costs is filed with the court." MCR 6.101(C).

"A court must issue an arrest warrant, or a summons . . . if presented with a proper complaint and if the court finds probable cause to believe that the accused committed the alleged offense." MCR 6.102(A). The probable cause determination "may be based on hearsay evidence[,] . . . factual allegations in the complaint, affidavits from the complainant or others, the testimony of a sworn witness adequately preserved to permit review, or any combination of these sources." MCR 6.102(B). The court rule also governs the contents of the warrant, discretionary interim bail, and the execution and return of the warrant. MCR 6.102(C)–(F).

The court may issue a summons instead of an arrest warrant if requested by the prosecutor. MCR 6.103(A). The court rule provides for the form of the summons, its service and return. MCR 6.103(B)–(C).

*See *Criminal Procedure Monograph 4: Felony Arraignments in District Court—Revised Edition* (MJI, 2004).

The procedures for arraignment on the warrant or complaint are governed by MCR 6.104. A person in custody "must be taken without unnecessary delay before a court." MCR 6.104(A). As the arraignment on a felony occurs in district court, the process is beyond the scope of this benchbook.* However, a felony arraignment script is provided in the Appendix. At a defendant's arraignment the court must address issues of pretrial release, possible appointment of counsel, and scheduling the defendant's preliminary examination. These matters are addressed in Sections 4.3 and 4.4 of the benchbook.

If the case is bound over to circuit court after arraignment in district court, an information must be filed on or before the date set for arraignment in circuit court. See MCL 767.1 and MCL 767.40. See also MCR 6.112(B) and (C).

4.2 Arrest

US Const, Am V

US Const, Am XIV

MCR 6.102 Arrest on a warrant

MCR 6.103 Summons instead of arrest

MCR 6.104 Arraignment on the warrant or complaint

A. Probable Cause

Whether there is probable cause for arrest without a warrant depends upon whether, in light of the particular circumstances, a person of reasonable prudence and caution would conclude that the person arrested had committed a felony. *People v Harper*, 365 Mich 494, 500–501 (1962).

B. Delay Between Crime and Arrest

An "oppressive" delay between the alleged crime and the defendant's arrest may implicate a defendant's due process rights and lead to a motion to dismiss. *People v Tanner*, 255 Mich App 369, 414 (2003), reversed on other grounds 469 Mich 437 (2003). In deciding the motion, the test is whether the delay caused "actual and substantial" prejudice to the defendant's right to a fair trial. *People v Cain*, 238 Mich App 95, 109–110 (1999); *People v Bisard*, 114 Mich App 784, 786–791 (1982).

The two-part test used to determine whether a defendant was denied due process requires the court to balance the actual prejudice to the defendant with the prosecutor's reasons for the delay. *Cain*, *supra* at 108–109; *Bisard, supra* at 790–791. First, the defendant must produce evidence that he or she

sustained "actual and substantial" prejudice because of the delay. *Cain, supra* at 108; *Bisard, supra* at 791. "Actual and substantial" prejudice means that the defendant's ability to defend against the charges was "meaningfully impaired" by the delay. *Cain, supra* at 110; *Bisard, supra* at 788. Once the defendant has made a showing of prejudice, the prosecution has the burden of persuading the court that the reasons for the delay justified any prejudice that resulted. *Cain, supra* at 109; *Bisard, supra* at 791. See also *People v Adams*, 232 Mich App 128, 132–139 (1998) (12-year delay did not violate the defendant's due process rights under the circumstances presented), and *Cain, supra*, 238 Mich App at 107–111 (16-month delay did not unfairly prejudice the defendant under the circumstances).

C. Delay Between Warrantless Arrest and Arraignment

Persons arrested without a warrant must be promptly brought before a neutral magistrate for a probable cause determination. *Gerstein v Pugh*, 420 US 103, 126 (1975); *People v Cipriano*, 431 Mich 315, 319 (1988); MCL 764.13; MCL 764.26; MCR 6.104(A).

"[A] jurisdiction that provides judicial determinations of probable cause within 48 hours of [a warrantless] arrest will, as a general matter, [be found to] comply with the promptness requirement" of the federal constitution's Fourth Amendment. *Riverside v McLaughlin*, 500 US 44, 56 (1991). However, a probable cause determination is not automatically proper simply because it is made within 48 hours. *Riverside, supra* at 56. A delay of less than 48 hours may still be unconstitutional if it is an unreasonable delay. *Id*.

Police authorities may hold an arrestee for more than 48 hours before arraignment only if the authorities can "demonstrate the existence of a bona fide emergency or other extraordinary circumstance" that would justify the delay. *People v Whitehead*, 238 Mich App 1, 2 (1999), quoting *Riverside, supra*, 500 US at 57.

D. Arrest Outside Jurisdiction

An arrest by an officer outside the officer's jurisdiction does not require exclusion of the evidence obtained as a result of the arrest or dismissal of the charge. *People v Hamilton*, 465 Mich 526, 527 (2002).* "The Fourth Amendment exclusionary rule only applies to constitutionally invalid arrests, not merely statutorily illegal arrests." *Hamilton, supra* at 532–533. Probable cause that a crime has been committed is all that is required for a constitutional arrest; the crime committed may be a felony or a misdemeanor. *Id*. at 533. Where probable cause to arrest exists, the arrest is constitutional and the exclusionary rule does not apply.

*See *Bright v Littlefield*, 465 Mich 770, 775 n 5 (2002), where the Court explains that its decision in *Bright* is consistent with *Hamilton*.

4.3 Pretrial Release

Const 1963, art 1, § 15(d)

Const 1963, art 1, § 16

MCR 6.106 Pretrial release

MCL 765.1 *et seq*. Bail, Chapter V, Code of Criminal Procedure Chapter 765

MCL 780.581 *et seq*. Release of misdemeanor prisoners

A. Purpose

The purpose of a bond is to assure the appearance of the defendant. *People v Benmore*, 298 Mich 701, 704 (1941).

B. Interim Bond for Misdemeanors

Statutory law requires that a person arrested for a misdemeanor must be taken "without unnecessary delay" before a magistrate to answer the charge. MCL 780.581(1).

> "[I]f a magistrate is not available or immediate trial is not possible, the person may secure release by depositing with the police an interim bond to guarantee appearance in court to answer the charge. MCL 780.581(2)[parallel citation omitted]. 'The bond shall be a sum of money' no more than one hundred percent nor less than twenty percent of the maximum possible fine the person faces if convicted. MCL 780.581(2)[parallel citation omitted]. [T]he police [do not have] the authority to impose other conditions for release." *People v Williams*, 196 Mich App 404, 407–408 (1992).

In general, at a defendant's first appearance in court, the court must order that, pending trial, the defendant: (1) be held in custody; (2) be released on personal recognizance; or (3) be released conditionally, with or without money bail. MCR 6.106(A).

If the court determines that the defendant may not be released, the court must order the defendant held in custody for a period not to exceed 90 days after the date of the order, excluding delays attributable to the defense. Within that 90 days, the trial must begin or the court must immediately schedule a hearing and set the amount of bail. MCR 6.106(B)(3).

The court must state the reasons for an order of custody on the record and on a form approved by the State Court Administrator's Office entitled "Order for Pretrial Release/Custody" (MC 240). MCR 6.106(B)(4).

C. Personal Recognizance

If the defendant is not ordered held in custody, the court must set a personal recognizance bond or an unsecured appearance bond. MCR 6.106(B). This bond is subject to the conditions that the defendant will appear as required, will not leave the state without permission of the court, and will not commit any crime while released. However, if the court determines that such release will not reasonably ensure the appearance of the defendant, or that such release will present a danger to the public, the court may deny the defendant a personal recognizance bond. MCR 6.106(C).

D. Conditional Release

The court may order the pretrial release of the defendant subject to any condition(s) (in addition to the conditions attending a personal recognizance bond) the court determines are reasonably necessary to ensure the appearance of the defendant as required and the safety of the public. MCR 6.106(D)(1) and MCR 6.106(D)(2).

The court may require the defendant to do any of the following, as set forth in MCR 6.106(D)(2):

> (a) make reports to a court agency as are specified by the court or the agency;
>
> (b) not use alcohol or illicitly use any controlled substance;
>
> (c) participate in a substance abuse testing or monitoring program;
>
> (d) participate in a specified treatment program for any physical or mental condition, including substance abuse;
>
> (e) comply with restrictions on personal associations, place of residence, place of employment, or travel;
>
> (f) surrender driver's license or passport;
>
> (g) comply with a specified curfew;
>
> (h) continue to seek employment;
>
> (i) continue or begin an educational program;
>
> (j) remain in custody of a responsible member of the community who agrees to monitor the defendant and report any violation of any release condition to the court;
>
> (k) not possess a firearm or other dangerous weapon;

(l) not enter specified premises or areas and not assault, beat, molest or wound a named person or persons;

(m) satisfy any injunctive order made a condition of release; or,

(n) comply with any other condition, including the requirement of money bail as described in MCR 6.106(E), reasonably necessary to ensure the defendant's appearance as required and the safety of the public.

E. Money Bail

If the court determines for reasons stated on the record that the defendant's appearance or the protection of the public cannot be assured, money bail, with or without the conditions set forth above, may be required. MCR 6.106(E)(1)(a) provides that the court may require the defendant to post a bond executed by a surety, by the defendant, or by another who is not a licensed surety, and secured by a cash deposit for the full bond amount or a cash deposit of 10% of the bond amount, or, with the court's consent, designated real property.

MCR 6.106(E)(1)(b) is substantially the same as MCR 6.106(E)(1)(a) except that the court may require the defendant to post the entire amount of the bond, or designated real property. Under this subrule, the defendant cannot post a cash deposit of 10% of the bond amount. When setting money bond, the court should recognize the requirements of Article 1, Section 16 of the Michigan Constitution. That section provides that "excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained."

"Money bail is considered excessive if it is in an amount greater than reasonably necessary to adequately assure that the defendant will appear when his presence is required." *People v Edmond*, 81 Mich App 743, 747–748 (1978). The Court made this finding under GCR 1963, 790.7(b), the prior rule.

MCL 765.6(1) provides:

> "Except as otherwise provided by law, a person accused of a criminal offense is entitled to bail. The amount of bail shall not be excessive. The court in fixing the amount of the bail shall consider and make findings on the record as to each of the following:
>
> > "(a) The seriousness of the offense charged.
> >
> > "(b) The protection of the public.
> >
> > "(c) The previous criminal record and the dangerousness of the person accused.

> "(d) The probability or improbability of the person accused appearing at the trial of the cause."

Effective June 24, 2004, 2004 PA 167 eliminated language in MCL 765.6(1) requiring that bail "be uniform whether the bail bond is executed by the person for whom bail has been set or by a surety." 2004 PA 167 added the following provision to MCL 765.6:

> "(2) If the court fixes a bail amount under subsection (1) and allows for the posting of a 10% deposit bond, the person accused may post bail by a surety bond in an amount equal to 1/4 of the full bail amount fixed under subsection (1) and executed by a surety approved by the court."

F. Denial of Pretrial Release

Bail may be denied to a defendant charged with murder or treason when the proof of the defendant's guilt is evident or the presumption of guilt is great. Const 1963, art 1, §15; MCL 765.5; MCR 6.106(B)(1)(a)(*i*); *People v Milosavleski*, 450 Mich 951 (1996). The court may also deny pretrial release to a defendant charged with committing a violent felony when one of the following circumstances apply:

- at the time of the violent felony, the defendant was on probation, parole, or on release pending trial for another violent felony, or
- the defendant has two prior convictions for violent felonies within the past 15 years. MCR 6.106(B)(1)(a).

MCR 6.106(B)(2) defines a "violent felony" as a felony that involves a violent act or threat of a violent act against any other person.

The court may also deny pretrial release to a defendant charged with first degree criminal sexual conduct, armed robbery, or kidnapping with intent to extort money if it finds proof of the defendant's guilt is evident or the presumption of guilt is great. The court still may grant pretrial release to the defendant if it finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person. MCR 6.106(B)(1)(b).

The rules of evidence do not apply to proceedings involving pretrial release on bond or otherwise. MRE 1101(b)(3).

G. Rationale for Decision

In deciding which release to use and what terms and conditions to impose, the court, pursuant to MCR 6.106(F)(1), should consider the following information:

(a) defendant's prior criminal record, including juvenile offenses;

(b) defendant's record of appearance or nonappearance at court proceedings or flight to avoid prosecution;

(c) defendant's history of substance abuse or addiction;

(d) defendant's mental condition, including character and reputation for dangerousness;

(e) the seriousness of the offense charged, the presence or absence of threats, and the probability of conviction and likely sentence;

(f) defendant's employment status and history and financial history insofar as these factors relate to the ability to post money bail;

(g) the availability of responsible members of the community who would vouch for or monitor the defendant;

(h) facts indicating the defendant's ties to the community, including family ties and relationships, and length of residence; and,

(i) any other facts bearing on the risk of nonappearance or danger to the public.

In making its decision, the court need not make a finding on each of the enumerated factors. The court must merely state the reasons for its decision on the record.

H. Custody Hearing

If a defendant has been denied pretrial release pursuant to MCR 6.106(B), the defendant may be held in custody for 90 days (not counting days resulting from the defendant's delay). After 90 days, the defendant's trial must begin or the court must immediately schedule a hearing and set bail for the defendant. The court may conduct a custody hearing if the defendant is being held in custody pursuant to MCR 6.106(B) and the defendant requests a custody hearing. The purpose of the hearing is to permit the parties to litigate all of the issues relevant to challenging or supporting a custody decision. MCR 6.106(G)(1).

I. Standard of Review

A bail decision by a district court judge at the close of a preliminary examination does not constitute a review of the initial bail decision made by a magistrate at the arraignment; the bail decision following preliminary examination is a new bail decision and, once entered, it is the decision subject to review and deference as set forth in the court rules. MCR 6.110(G); *People v Wershe*, 166 Mich App 602, 606 (1988).

A district court magistrate's decision is reviewed de novo as an appeal of right in district court. *Wershe, supra* at 607; MCL 600.8515.

4.4 Attorneys—Right to Counsel—Substitute Counsel

US Const, Am VI

A. Right to Counsel

No person may receive an actual or suspended sentence for any offense—petty, misdemeanor, or felony—unless he or she was represented by counsel at trial or knowingly and intelligently waived representation. *Alabama v Shelton*, 535 US 654, 657–658, 662 (2002).

In *People v Reichenbach*, 459 Mich 109, 115 (1998), the defendant asserted that his 1989 plea-based and counselless misdemeanor conviction could not be used to enhance a later conviction because he had neither been informed in 1989 of his right to *appointed* counsel nor had he waived his right to counsel before pleading guilty. In deciding that the defendant's 1989 conviction was properly used to enhance a later charge despite the absence of counsel, the Michigan Supreme Court adopted the United States Supreme Court's decisions in *Argersinger v Hamlin*, 407 US 25 (1972), and *Scott v Illinois*, 440 US 367 (1979).

Argersinger decided the fundamental principle that regardless of the severity of the offense charged, an individual could not be deprived of his or her liberty without having had the assistance of counsel. *Argersinger*, *supra* at 40. The *Argersinger* Court concluded that wherever "actual imprisonment" was the result, the defendant must receive the benefit of counsel. *Id*. The *Scott* Court affirmed *Argersinger's* "actual imprisonment" distinction and emphasized the difference between "actual imprisonment" and the "mere threat of imprisonment." *Scott*, *supra* at 373–374. The *Reichenbach* Court concluded:

> "The Michigan Constitution does not afford indigent misdemeanor defendants the right to appointed counsel absent 'actual imprisonment' under *Argersinger* and *Scott*." *Reichenbach*, *supra* at 118.

For purposes of the actual sentence imposed after an indigent defendant's conviction, the United States Supreme Court eliminated the significance of "actual imprisonment" versus "threatened" imprisonment. Following the Court's decision in *Alabama v Shelton*, 535 US 654 (2002), not only is an indigent defendant who is not represented by counsel and who has not waived the right to appointed counsel exempt from receiving a sentence of "actual imprisonment," a *probated* or *suspended* sentence of imprisonment is similarly invalid under the same circumstances.

In *Shelton*, the United States Supreme Court implicitly disagreed with the Michigan Supreme Court's reasoning in *Reichenbach*. The Court affirmed the Alabama Supreme Court's conclusion (and the Alabama Court's explicit disagreement with *Reichenbach*) that no real distinction could exist between "actual imprisonment" and probated or "threatened" imprisonment for purposes of an indigent defendant's right to counsel. *Shelton, supra* at 659. Because an unrepresented indigent defendant who had not waived his or her right to counsel could not be made to serve any part of a "probated" or "suspended" sentence for the same reason that no term of "actual" imprisonment could be imposed, any distinction was illusory. *Id*. The United States Supreme Court held that a defendant has a constitutional right to counsel when he or she receives a probated or suspended sentence of imprisonment. *Id*. at 674. In other words, an indigent defendant who is not represented by counsel and who has not waived the right to appointed counsel may not be given a probated or suspended sentence of imprisonment.

B. Indigence—Waiver of Fees and Court-Appointed Counsel

MCR 2.002 Waiver or suspension of fees and costs for indigent persons

MCR 6.005(B) Questioning a defendant about indigency

MCR 6.005(C) Partial indigence

MCR 6.425(F)(1)(b) Appointment of appellate counsel for indigent persons

MCR 6.433(A) Documents for post-conviction proceedings; indigent defendant; appeals of right

1. Generally

MCR 2.002 authorizes a trial court to waive or relieve an indigent person of his or her obligation to pay fees and costs and assures that a complainant will not be denied access to the courts on the basis of indigence. *Lewis v Dep't of Corrections*, 232 Mich App 575, 579 (1998).

Indigence must be determined on a case-by-case basis by considering the defendant's financial ability, not that of his or her friends or relatives. MCR 6.005(B). *People v Arquette*, 202 Mich App 227, 230 (1993).

MCR 2.002(D) places the initial burden of establishing indigence on the individual requesting a waiver of fees and costs.

2. Reinstatement of Fees

At the end of litigation, the court may order a person to pay the costs and fees that were waived when the reason for the waiver or suspension no longer exists. MCR 2.002(G).

When the trial court noted that it suspended filing fees to ensure timely review of the prisoner petitioner's complaint, the trial court did not abuse its discretion in reinstating petitioner's obligations to pay the fees following review of petitioner's complaint because the reason for suspension no longer existed. *Langworthy v Dep't of Corrections*, 192 Mich App 443, 445–446 (1992).

3. Appointment of Counsel

If a defendant requests an attorney and claims financial inability to retain one, the court must determine whether the defendant is indigent. MCR 6.005(B). The factors used to guide the court in this determination include:

> "(1) [the defendant's] present employment, earning capacity and living expenses;
>
> "(2) [the defendant's] outstanding debts and liabilities, secured and unsecured;
>
> "(3) whether the defendant has qualified for and is receiving any form of public assistance;
>
> "(4) availability and convertibility, without undue financial hardship to the defendant and the defendant's dependents, of any personal or real property owned; and
>
> "(5) any other circumstances that would impair the ability to pay a lawyer's fee as would ordinarily be required to retain competent counsel." MCR 6.005(B)(1)–(5).

A defendant's ability to post bond and gain pretrial release does not make the defendant ineligible for a court-appointed lawyer. MCR 6.005(B).

A showing that a defendant may be able to pay some portion of his or her defense does not preclude the appointment of counsel. MCR 6.005(C). See also *People v Bohm*, 393 Mich 129, 130 (1974) (court ordered that the defendant be appointed counsel on the basis of the defendant's "partial eligibility" under the standards used before the adoption of MCR 6.005(C)).

4. Standard of Review

A trial court's determination of a defendant's indigence is reviewed for an abuse of discretion. *People v Gillespie*, 42 Mich App 679, 681–682 (1972).

C. Substitution or Withdrawal of Counsel

MCR 2.117(C)(2) Duration of appearance by attorney

MCR 6.001(D) Civil rules applicable

While an indigent defendant is entitled to have counsel appointed at public expense, he or she is not entitled to choose the lawyer. An indigent defendant may be entitled to have his or her assigned lawyer replaced on a showing of adequate cause. *People v Ginther*, 390 Mich 436, 441 (1973).

A defendant is not entitled to replace his or her assigned counsel whenever the defendant is dissatisfied with the attorney for some reason. *People v Bradley*, 54 Mich App 89, 95 (1974). If there is good cause to discharge a defendant's first appointed attorney and to do so would not disrupt the judicial process, substitution of counsel may be proper. *Id*. A defendant has no right to continuously threaten and then replace a court-appointed attorney. *People v Harlan*, 129 Mich App 769, 778 (1983).

A defendant's Sixth Amendment right to counsel was not violated when a trial court denied the defendant's timely request to admit *pro hac vice* an attorney licensed in Ohio to assist the defendant's Michigan attorney at trial. *People v Fett*, 469 Mich 907 (2003).

1. Good Cause

*See Section 4.46, on ineffective assistance of counsel.

What constitutes good cause for substitution of counsel depends on the facts and circumstances of each case.* *People v Hernandez*, 84 Mich App 1, 7 (1978). Lack of preparation, failure to call or investigate witnesses, etc., without a showing of prejudice, do not generally constitute good cause. *Hernandez, supra,* 84 Mich App at 7–8. A valid and reasonable disagreement between counsel and the defendant regarding a fundamental trial tactic satisfies the good cause requirement. *People v Jones*, 168 Mich App 191, 194 (1988). The fact that a defendant filed a grievance against his or her counsel or expressed a lack of confidence in counsel does not establish the good cause necessary to warrant substitution of counsel. *People v Traylor*, 245 Mich App 460, 463 (2001).

2. Procedure

A trial court is obligated to take testimony and make findings when a factual dispute exists with regard to a defendant's assertion that his or her assigned attorney "is not adequate or diligent or . . . disinterested[.]" *Ginther, supra*, 390 Mich at 441–442. A full adversarial proceeding is not required and in some circumstances, questioning of the attorney alone may be sufficient. *People v Ceteways*, 156 Mich App 108, 119 (1986); *People v Morgan*, 144 Mich App 399, 402 (1985).

3. Standard of Review

The trial court's decision on a request for substitution of counsel is reviewed for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462 (2001); *People v Mack*, 190 Mich App 7, 14 (1991).

4.5 Attorneys—Waiver of Counsel

US Const, Am VI

Const 1963, art 1, § 13

MCR 6.005(A) and (D) Right to assistance of lawyer; appointment or waiver

MCR 6.905(C) Assistance of attorney; waiver of attorney

MCL 763.1 Rights of accused; hearing by counsel, defense, confronting witnesses

A. Right of Self-Representation

A defendant's right to represent himself or herself is implicitly guaranteed by the federal and state constitutions and by statute. However, there is no absolute right to proceed to trial without counsel. *People v Dennany*, 445 Mich 412, 427 (1994). If a defendant wishes to proceed to trial without the assistance of an attorney, the court is required to safeguard the defendant's waiver by communicating with the defendant:

> "First, the court may not permit the defendant to waive the right to be represented by a lawyer without advising the defendant of (a) the charge, (b) the maximum possible prison sentence for the offense, (c) any mandatory minimum sentence required by law, and (d) the risk involved in self-representation.
>
> "Second, a defendant who wishes to proceed pro se must be offered the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.
>
> "Third, even though a defendant has waived the assistance of a lawyer, the waiver must be reaffirmed at each subsequent proceeding.
>
> "In addition, pursuant to [*People v*]*Anderson*, [398 Mich 361 (1976),] the court must, upon a defendant's initial request to proceed pro se, determine three things: (1) that the request is unequivocal; (2) that the right has been asserted knowingly, intelligently, and voluntarily through a colloquy advising the

> defendant of the disadvantages of self-representation; and (3) that self-representation will not disrupt, unduly inconvenience, or burden the court." *Dennany, supra*, 445 Mich at 438–439.

A defendant's refusal to cooperate with his appointed counsel and his unequivocal request to be provided with a different defense attorney at trial does not constitute a waiver of counsel or operate as the defendant's request to proceed in propria persona (in pro per or pro se) where the record shows that "[the] defendant clearly and unequivocally declined self-representation." *People v Russell*, 471 Mich 182, 184 (2004).

In *Russell*, the defendant informed the trial court at the beginning of trial that he wanted the trial court to appoint a substitute for the defendant's *second* court-appointed attorney. The court refused to appoint different counsel unless the defendant offered "some valid reason" other than "personality difficulties" to justify the appointment of a third defense attorney. The defendant failed to provide any such explanation, and the court explained to the defendant his options: (1) the defendant could retain the counsel of his choice; (2) the defendant could continue with the present attorney's representation; (3) the defendant could represent himself without any legal assistance; or (4) the defendant could represent himself with the assistance of his present attorney. The defendant continued to express his dissatisfaction with his present attorney's defense at the same time that he clearly indicated that he did not wish to conduct his own defense, that he "needed" to be provided with "competent counsel." *Russell, supra,* 471 Mich at 184–186.

The *Russell* Court reaffirmed the "requirements regarding the judicial inquest necessary to effectuate a valid waiver and permit a defendant to represent himself" as set forth in *Faretta v California*, 422 US 806 (1975), and first adopted by the Michigan Supreme Court in *People v Anderson,* 398 Mich 361 (1976). *Russell*, *supra*, 471 Mich at 190 n 22. Applying those requirements to the facts in *Russell*, the Court concluded:

> "In this case, a review of the record indicates two key facts: first, that defendant expressly rejected self-representation and, second, that defendant never voluntarily waived his Sixth Amendment right to the assistance of counsel at trial. Indeed, defendant clearly sought appointment of *another* trial counsel, and defendant and the trial court engaged in a lengthy dialogue over defendant's desire to have substitute counsel appointed.
>
> "While defendant was given clear choices, defendant consistently denied that *his* choice was self-representation. Throughout his colloquy with the trial court, defendant steadfastly rejected the option of proceeding to trial without the assistance of counsel. Therefore, it cannot be said, as the Court of Appeals and dissenting opinions maintain, that defendant *unequivocally* chose self-representation and voluntarily waived his Sixth Amendment right to counsel.

> "We believe that defendant's repudiation of self-representation was unmistakable in this case. However, to the degree that defendant's refusal to explicitly choose between continued representation by appointed counsel and self-representation created any ambiguity regarding plaintiff's desire to unequivocally waive his right to trial counsel, any ambiguity should have been resolved in favor of representation because, consistently with [*People v*] *Adkins* [*(After Remand)*, 452 Mich 702 (1996)] and United States Supreme Court precedent, courts *must* indulge every reasonable presumption against the waiver of the right to counsel [footnotes omitted]." *Russell, supra,* 471 Mich at 192–193.

A defendant may make an unequivocal, knowing, intelligent, and voluntary waiver of his right to counsel even though the defendant's request to represent himself was prompted by his dissatisfaction with his counsel's cross-examination of two prosecution witnesses and the trial court denied the defendant's request to recall the witnesses so that he could question them. *People v Williams*, 470 Mich 634, 647 (2004).

During the trial in *Williams*, the defendant expressed his desire to represent himself and asked to be permitted to question two witnesses who had already been excused. After the trial court clearly advised the defendant that the witnesses would not be recalled and he would not have the opportunity to question them, the defendant stated that he still wished to proceed with self-representation. The defendant then asserted that the witnesses' testimony at his preliminary examination would rebut the unfavorable testimony given by the witnesses at trial and asked to have their preliminary examination testimony read at trial. The court denied this request and the defendant's subsequent request to be allowed time to review the preliminary examination transcript himself. Despite the trial court's denial of all his requests, the defendant again expressed an unequivocal desire to represent himself and waive counsel. *Williams, supra*, 470 Mich at 637–639, 643. According to the Court, "Defendant's unrealistic 'hopes of introducing evidence' in contravention of the court's explicit ruling do not render invalid defendant's unequivocal invocation of his right to self-representation." *Williams, supra*, 470 Mich at 644.

There is no *federal* constitutional right to self-representation on direct appeal from a criminal conviction. *Martinez v California*, 528 US 152, 163 (2000). The United States Supreme Court clearly stated, however, that nothing in its *Martinez* holding prevented any state from recognizing a right to self-representation in appellate proceedings under the state's constitution. *Id*.

B. Waiver of Right to Counsel

Before a trial court may grant a defendant's request to proceed pro se, it must determine whether:

(1) the defendant's request for self-representation was unequivocal;

(2) the defendant's request was made knowingly, intelligently, and voluntarily; and

(3) the court would be unduly burdened, inconvenienced, or disrupted if the defendant's request was granted.

See MCR 6.005(D); *People v Anderson,* 398 Mich 361, 367–368 (1976); *People v Blunt*, 189 Mich App 643, 647 (1991); *Faretta v California*, 422 US 806, 835 (1975).

The U.S. Supreme Court has cautioned that there is no specific list of questions that should be used; rather, the inquiry should be tailored to the particular case and stage of the proceedings. *Iowa v Tovar*, 541 US 77 (2004).

*A form and script for a defendant's waiver of counsel is located in the Appendix.

A valid waiver of counsel requires substantial compliance with MCR 6.005(D).* *People v Adkins (After Remand)*, 452 Mich 702, 721 (1996). To ensure that the defendant's choice is made knowingly and intelligently, the trial court must advise the defendant of the dangers and disadvantages of self-representation. MCR 6.005(D). MCR 6.005(D) requires the trial court to advise the defendant of the charges, the maximum penalty upon conviction, and the risks associated with self-representation. MCR 6.005(D)(1). The court rule also requires the trial court to provide the defendant with an opportunity to consult with counsel—appointed counsel, if the defendant is indigent. MCR 6.005(D)(2); *People v Hicks*, 259 Mich App 518, 523 (2003).

A juvenile defendant may waive the assistance of counsel according to the requirements of MCR 6.905(C). These requirements mandate that the court appoint standby counsel to assist the juvenile at trial and sentencing. MCR 6.905(C)(5).

C. Advice at Subsequent Proceedings

Once a defendant has waived the assistance of a lawyer, a record must be made at each subsequent proceeding to show that the court advised the defendant of the continuing right to a lawyer (at public expense if the defendant is indigent) and that the defendant has waived the right. MCR 6.005(E). At the beginning of any proceeding following the defendant's intial waiver of counsel, the record should reflect the defendant's continued waiver of counsel or the defendant's request for the assistance of counsel. If the defendant requests an attorney and can afford to retain one, arrangements must be made to permit the defendant to do so. If the defendant requests an attorney and is indigent, the court must appoint an attorney to represent the defendant.

D. Standby Counsel

"[A] request to proceed pro se with standby counsel—be it to help with either procedural or trial issues—can never be deemed to be an unequivocal assertion of the defendant's rights." *Dennany*, *supra*, 445 Mich at 446. The Court of Appeals decided not to follow the plurality decision in *Dennany* when it decided that a defendant's request for standby counsel does not make that same defendant's request for self-representation invalid as a matter of law. *Hicks, supra*, 259 Mich App at 526–527. A defendant's request for self-representation can be accompanied by a request for standby counsel without affecting the unequivocal nature of the defendant's request to proceed in pro per. *Hicks*, *supra,* 259 Mich App at 528–530. According to the *Hicks'* Court, the trial court should evaluate the defendant's credibility to determine the vacillation or unequivocal nature of a defendant's request. *Hicks, supra*, 259 Mich App at 528.

The presence of standby counsel alone does not legitimize a waiver of counsel inquiry when the inquiry does not satisfy legal requirements. *Dennany*, *supra*, 445 Mich at 448.

E. Standard of Review

A trial court's determination whether a waiver was knowing and intelligent is reviewed for clear error. *People v Williams*, 470 Mich 634, 640 (2004). The meaning of "knowing and intelligent" is a question of law and is reviewed de novo on appeal. *Id*.

4.6 Grand Jury

MCR 6.005(I) Assistance of lawyer at grand jury proceedings

MCR 6.107 Grand jury proceedings

MCL 767.1–MCL 767.26 Grand juries, indictments, informations and proceedings before trial

Criminal prosecutions may be initiated upon the filing of a complaint and an information by the prosecuting attorney or by grand jury indictment. MCL 767.1 *et seq.*; *People v Glass (After Remand)*, 464 Mich 266, 276 (2001). An information shall not be filed until the defendant has had or waived a preliminary examination. MCL 767.42. However, indictees do not have the right to a preliminary examination. *Glass, supra*, 464 Mich 266, overruling *People v Duncan*, 388 Mich 489 (1972) (which had granted indictees the right to a preliminary examination). The grand jury indictment is a procedural alternative to the preliminary examination. There is no state constitutional right to indictment by a grand jury. See also *People v Baugh*, 249 Mich App 125 (2002) (where the defendant was indicted by grand jury, the information

issued after the defendant's preliminary examination was null and void following the Court's decision in *Glass, supra*).

Grand juries are creatures of statute. Generally the statutes provide for a one-person grand jury, a citizen grand jury comprised of 13 to 17 grand jurors, and a multi-county grand jury.

A. One-Judge Grand Jury

MCL 767.3–MCL 767.6b Proceedings before trial involving a one-judge grand jury

A judge may act as a "one-man grand jury" when there is probable cause to believe a crime has been committed. MCL 767.3. The one-judge grand jury statute does not violate a defendant's right to due process. See *In re Colacasides*, 379 Mich 69, 75 (1967). Whether the judge orders an inquiry "into the matters relating to [the alleged crime]" is discretionary. MCL 767.3.

B. Citizen Grand Jury

MCL 767.7 Grand jury; procedure for summoning

MCL 767.7a Grand jury; term of service

MCL 767.8–MCL 767.26 Detailed grand jury procedures

Citizen grand juries are drawn and summoned as directed by the court. MCL 767.7. A grand juror's term of service is six months. MCL 767.7a. Not more than 17 persons and not less than 13 shall be sworn on any grand jury. MCL 767.11. A foreperson is appointed by the court. MCL 767.11; MCL 767.12. Witnesses appearing before the grand jury have the right to counsel. MCL 767.19e and MCR 6.005(I). An indictment requires the concurrence of at least nine of the grand jurors. MCL 767.23. The foreperson shall present the indictment to the court in the presence of the grand jury. MCL 767.25(1). The judge presiding over the grand jury proceedings shall then return the indictment to the court having jurisdiction. MCL 767.25(3). An arrest warrant may be issued by the court. MCL 767.30. The statute contemplates that a defendant will be arraigned in the court having jurisdiction over the matter because the statute indicates that the court may properly receive the indictee's plea of guilty if offered. MCL 767.37.

A grand jury is not required to "reflect the precise racial composition of a community." *Glass, supra*, 464 Mich at 284, citing *Akins v Texas*, 325 US 398 (1945). The *Glass* Court indicated that the three-step analysis used to resolve a defendant's claim that his or her petit jury did not represent a fair cross-section of the community should also be used to resolve a defendant's claim regarding grand juries. In addition to showing discriminatory intent, a defendant must show that his or her race was substantially underrepresented

on the grand jury in order to establish a prima facie case of racial discrimination. *Glass, supra*, 464 Mich at 285. In *Glass*, the Court applied the three steps set forth in *Castaneda v Partida*, 430 US 482, 494 (1977):

- The defendant must show that he or she belongs to a recognizable and distinct class singled out for different treatment by the law as written or as applied.
- The defendant must show that there existed significant underrepresentation of that class over a significant period of time.
- The defendant must show that the selection procedure was susceptible to abuse or was not racially neutral. *Glass, supra*, 464 Mich at 285.

C. Multi-County Grand Jury

MCL 767.7b–MCL 767.7g Multicounty grand juries; petition to convene; circumstances required to convene; convening

MCL 767.23a Indictment by a multicounty grand jury

In considering a challenge to the creation or scope of a multicounty grand jury, consider reviewing a copy of the petition, order of the court of appeals, presiding judge's order and any order continuing the term of the grand jury. In addition, seek information regarding the number and source of the grand jurors along with the number concurring in any indictment being challenged.

D. Right to Counsel

Witnesses have the right to a lawyer's assistance and indigent witnesses have the right to a court-appointed attorney. MCR 6.005(I); MCL 767.19e.

E. Rules of Evidence

With the exception of those rules regarding privilege, the rules of evidence do not apply to grand jury proceedings. MRE 1101(b)(2).

Testimony given before the grand jury may be admissible at trial, subject to the rules of evidence. See *People v Chavies*, 234 Mich App 274, 281–284 (1999).

F. Discovery

A defendant is entitled to a transcript of his or her grand jury testimony and other parts of the grand jury record—including other witnesses' testimony—that touch on the issue of the defendant's guilt or innocence.* *People v Bellanca*, 386 Mich 708, 715 (1972). This entitlement applies whether the

*See also Section 4.26(C)(3).

defendant is charged by information or indictment. *People v Fagan (On Remand)*, 213 Mich App 67, 68–69 (1995).

4.7 Preliminary Examination—Motion to Quash

MCR 6.110 Preliminary examination

MCL 766.4 Preliminary examination

MCL 766.13 Discharge of defendant; binding defendant over for trial

MCL 767.74 Indictment; motion to quash, dilatory plea; proof

A. Preliminary Examination

> "The accused has a right to a preliminary examination before the prosecutor files an information in the court having jurisdiction to hear the cause. The accused and the state are entitled to a "prompt" examination. The primary function of a preliminary examination is to determine if a crime has been committed and, if so, if there is probable cause to believe that the defendant committed it. As to the timing of the preliminary examination, MCR 6.112(B) provides in pertinent part that unless the defendant is a fugitive from justice, the prosecutor may not file an information until the defendant has had or waives preliminary examination [internal citations omitted]." *Glass, supra*, 464 Mich 266 (2001).

B. Initial Bind Over by District Court

There is no constitutional right to a preliminary examination. Rather, a defendant's right to a preliminary examination is a statutory right to the determination whether a felony has been committed and whether there is probable cause to believe the defendant committed it. *People v Yost*, 468 Mich 122, 125–126 (2003). It is the magistrate's duty to bind a defendant over for trial if it appears at the conclusion of the preliminary examination that a felony has been committed and that the defendant committed it. MCL 766.13; *People v Abraham*, 234 Mich App 640, 655 (1999).

The magistrate's duty extends to judging the weight and competency of the evidence presented and the credibility of the witnesses. *People v Talley*, 410 Mich 378, 386 (1981); *People v Paille #2*, 383 Mich 621, 627 (1997). The decision to bind over a defendant does not require proof beyond a reasonable doubt, but the magistrate must find that evidence has been presented on each element of the crime charged or that the elements of the crime charged may be inferred from the evidence presented at the defendant's preliminary examination. *People v Hill*, 433 Mich 464, 469 (1989).

The preliminary examination must be held within 14 days of arraignment unless adjourned for good cause. MCL 766.4; MCL 766.7; MCR 6.104(E)(4); MCR 6.110(B)(1). A challenge to the timeliness of the preliminary examination must be raised before the preliminary examination begins. *People v Crawford*, 429 Mich 151, 157 (1987).

MCR 6.110(E) provides that if, after considering the evidence, the court determines that probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed it ("double probable cause"), the court must bind the defendant over for trial. If the court finds probable cause to believe that the defendant has committed an offense cognizable by the district court, it must proceed thereafter as if the defendant initially had been charged with that offense. See also MCL 766.13; *People v Hunt*, 442 Mich 359, 362 (1993); *People v Yost*, 468 Mich 122, 125–126 (2003).

The rules of evidence apply to a preliminary examination, unless otherwise provided by law. MCR 6.110(C).* The magistrate may only bind over on legally admissible evidence. *People v Hall*, 435 Mich 599, 624 (1990); *People v Walker*, 385 Mich 565, 576 (1971). Circumstantial evidence can be used. *People v Northey*, 231 Mich App 568, 573, 575 (1998); *People v Fiedler*, 194 Mich App 682, 693 (1992); *People v Coddington*, 188 Mich App 584, 591 (1991).

*A proposed amendment to MCR 6.110(C) would eliminate the requirement that a preliminary examination be governed by the rules of evidence. Administrative Order 2003-04.

> "In a preliminary examination, a district court's function is to determine whether the evidence is sufficient to cause an individual marked by discreetness and caution to have a reasonable belief that the defendant is guilty as charged. A bindover is not a finding of guilt beyond a reasonable doubt. Rather, '[a] preliminary hearing,' the Supreme Court has said, 'is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.'[Internal citations and footnote omitted.]" *People v Justice (After Remand)*, 454 Mich 334, 343 (1997).
>
> "Probable cause is defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged." *People v Waters*, 118 Mich App 176, 183 (1982), citing *People v Dellabonda*, 265 Mich 486, 490 (1933).

C. Review of District Court's Bind Over—Motion to Quash

A magistrate's determination at a preliminary examination is reviewed for an abuse of discretion. *People v Doss*, 406 Mich 90, 101 (1979). The *Doss* Court stated:

> "'Primarily the question of probable cause is for the consideration of and determination by the examining magistrate. *This Court may not agree with the findings of such magistrate but it has no right to substitute its judgment for his except in case of a clear abuse of discretion*.'" *Doss*, *supra* at 101, quoting *People v Dellabonda*, 265 Mich 486, 491 (1933) (emphasis added).

Review of the district court's bindover decision is limited to the preliminary examination transcript. *Waters*, *supra*, 118 Mich App at 183. The magistrate should not discharge the case when evidence conflicts or raises reasonable doubt of the defendant's guilt, since that presents the classic issue for the trier of fact. *Doss*, *supra*, 406 Mich at 103; *People v King*, 412 Mich 145, 153–154 (1981); *People v Cotton*, 191 Mich App 377, 384 (1991). For example, where there is credible evidence presented both to support and negate the existence of malice, a factual question exists that should be left to the jury. *People v Neal*, 201 Mich App 650, 655 (1993).

The abuse of discretion test is a narrow one. As stated in *People v Williams*, 386 Mich 565, 572 (1972):

> "The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of judgment but defiance thereof, not the exercise of reason, but rather of passion or bias."

Pursuant to a proper motion, if the trial court finds error in the probable cause finding, the court must either dismiss the information or remand the case to the district court for further proceedings. MCR 6.110(H).

D. Motion to Remand for Preliminary Examination

The trial court has discretion in deciding whether to grant or deny a motion to remand for preliminary examination. *People v Johnson*, 57 Mich App 117, 121 (1974). In order to prevail, the defendant must demonstrate that prejudice will result if the motion to remand is denied. *Id*. at 122.

E. Standard of Review

The trial court's decision on a motion to quash is reviewed for an abuse of discretion. *People v Abraham*, 234 Mich App 640, 655 (1999). If a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover. *People v Yost*, 468 Mich 122, 124 n 2 (2003); *People v Wilson*, 469 Mich 1011, 1011 (2004).

4.8 Information

MCR 6.112 Information or indictment

MCL 767.44 Indictment; forms for particular offenses, bill of particulars

MCL 767.45 Indictment; contents; offense, time, etc.

MCL 767.76 Indictment; time of objection to defect, amendment

A. Content

The required contents of an information are statutorily mandated. MCL 767.45 requires that an information contain: (1) the nature of the offense stated in language which will fairly apprise the accused and the court of the offense charged; (2) the time of the offense as near as possible; and (3) the location of the offense. MCL 767.45(1)(a)–(c); MCR 6.112(D).

Except where time is of the essence of the offense, an error in the time stated is not fatal to the information. MCL 767.45(1)(b).

B. Amendments

Unless a proposed amendment would unfairly surprise or prejudice the defendant, amendments are liberally permitted either before, during, or after trial to correct any defect in form or substance in the information. MCL 767.76; MCR 6.112(H).

Where the prosecution seeks to amend the information to add a criminal charge based on facts or evidence disclosed at the defendant's preliminary examination, a defendant is not unfairly surprised or prejudiced. *People v Fortson*, 202 Mich App 13, 16 (1993).

Even when an information is amended to charge a defendant with an offense carrying a more severe penalty, where the elements of the new offense were presented at the defendant's preliminary examination, a defendant cannot claim unfair surprise, inadequate notice, or insufficient opportunity to defend against the charge. *People v Hunt*, 442 Mich 359, 364–365 (1993).

Any error in amending an information is waived by a party's failure to object to the amendment. *People v Bettistea*, 173 Mich App 106, 120 (1988).

C. Joinder of Counts*

*See Section 4.18 for further discussion of joinder and severance.

MCR 6.120 Joinder and severance; single defendant

MCR 6.121 Joinder and severance; multiple defendants

1. Single Defendant

MCR 6.120 governs joinder for a single defendant charged with more than one offense. Joinder of two or more offenses in a single information or indictment is permissive, as is joinder of two or more informations or indictments. MCR 6.120(A). If more than one offense is charged in an information or indictment, each offense must be stated in a separate count. *Id*. Two or more informations or indictments may be consolidated in a single trial against the same defendant. *Id*.

A defendant may move to have separate trials for unrelated offenses. If the defendant moves for severance and the offenses are unrelated, the court must sever the charges. MCR 6.120(B). For purposes of the rule, offenses are related if they arise from

> "(1) the same conduct, or
>
> "(2) a series of connected acts or acts constituting part of a single scheme or plan." MCR 6.120(B).

Except for unrelated offenses that must be tried separately on the defendant's request, joinder or severance of other offenses is permissive on the request of either party or, subject to a party's objection, on the court's own initiative. MCR 6.120(C). Joinder or severance may be granted when it

> "is appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial." *Id*.

2. Multiple Defendants

MCR 6.121 governs joinder and severance when more than one defendant is involved. It provides:

> "(A) Permissive Joinder. An information or indictment may charge two or more defendants with the same offense. It may charge two or more defendants with two or more offenses when
>
> > "(1) each defendant is charged with accountability for each offense, or
> >
> > "(2) the offenses are related as defined in MCR 6.120(B).

> "When more than one offense is alleged, each offense must be stated in a separate count. Two or more informations or indictments against different defendants may be consolidated for a single trial whenever the defendants could be charged in the same information or indictment under this rule.
>
> "(B) Right of Severance; Unrelated Offenses. On a defendant's motion, the court must sever offenses that are not related as defined in MCR 6.120(B).
>
> "(C) Right of Severance; Related Offenses. On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.
>
> "(D) Discretionary Severance. On the motion of any party, the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence, the convenience of witnesses, and the parties' readiness for trial."

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.9 Motions

MCR 2.119 Motion practice

A. Generally

The MCRs do not provide for motion practice in criminal proceedings. Therefore, the rules for civil motion practice apply.* MCR 6.001(D).

*See Section 3.16, Motions for Reconsideration or Rehearing. See also *Criminal Procedure Monograph 6: Pretrial Motions—Revised Edition* (MJI, 2001).

B. Pretrial Conference

Because the court rules do not specifically provide for pretrial conferences in felony criminal cases, MCR 2.401 would apply. MCR 6.001(D). MCR 2.401 gives the court broad case management authority, including the authority to require the parties to attend scheduled pretrial conferences and the authority

to reject untimely plea agreements. MCR 2.401(E)–(F); *People v Grove*, 455 Mich 439, 469 (1997).

C. Pretrial Motions

In misdemeanor cases (those over which the *district* court has trial jurisdiction), the court may require pretrial motions to be filed and argued no later than the pretrial conference. MCR 6.610(B).

> "Under MCR 2.401(B)(1)(b), the trial judge may 'enter a scheduling order setting time limitations for the processing of the case and establishing dates when future actions should begin or be completed in the case.' Taken together, these rules implicitly confer the discretion to decline to entertain actions beyond the agreed time frame. Were the rules not so construed, scheduling orders would quickly become meaningless [footnote omitted]." *Grove*, *supra*, 455 Mich at 469.

A trial court has discretion to refuse to accept a plea agreement reached after a "plea cut-off date" established in a pretrial scheduling order. *Grove*, *supra*, 455 Mich at 469. This rule should also apply to motion deadlines in criminal cases.

D. Motion to Dismiss

No court rule or statute specifically addresses a motion to dismiss criminal charges. MCR 2.504 is the civil court rule governing dismissal of actions. Ordinarily a motion to dismiss is used to address issues such as double jeopardy or entrapment,* where dismissal of the case is the remedy.

*See Section 4.14, on double jeopardy, and Section 4.15, on entrapment.

A motion to dismiss which challenges the bindover decision after the preliminary examination is typically designated as a motion to quash.*

*See Section 4.7 for more information.

It is an abuse of discretion for the trial court to dismiss charges sua sponte. The prosecutor has exclusive authority to decide whom to prosecute. *People v Williams*, 244 Mich App 249, 254 (2001). MCL 767.29 governs the prosecution's practice of *nolle prosequi*.

E. Evidentiary Hearing

An evidentiary hearing must be conducted whenever a defendant challenges the admissibility of evidence on constitutional grounds. *People v Reynolds*, 93 Mich App 516, 519 (1979). Where a defendant fails to substantiate the claim that the evidence is inadmissible on constitutional grounds or it is apparent that the defendant's allegations do not rise to the level of a constitutional violation, no evidentiary hearing must be held. *People v Johnson*, 202 Mich App 281, 285 (1993).

Under MCR 6.110(D), the court need not conduct an evidentiary hearing during a preliminary examination if there is a preliminary showing that the evidence in question is admissible.

If the attorneys for the parties agree, a motion to exclude evidence may be decided on the information contained in the preliminary examination transcript. MCR 6.110(D). *People v Kaufman*, 457 Mich 266, 275–276 (1998).

The rules of evidence, except those with respect to privileges, do not apply to the determination of questions of fact preliminary to admissibility of evidence under MRE 104(a). MRE 1101(b)(1).

F. Disposition

Although a trial court's findings of fact and conclusions of law may facilitate appellate review, they are unnecessary in motion decisions unless required by court rule. MCR 2.517(A)(4). If the court makes findings and conclusions, they may be stated on the record or in a written opinion. MCR 2.517(A)(3). *People v Oliver*, 63 Mich App 509, 522–523 (1975).

A trial court sitting without a jury for a criminal case must make a record of the reasons for its verdict; in other words, the court must articulate for the record its findings of fact. *People v Jackson*, 390 Mich 621, 627 (1973); *Oliver*, *supra*, 63 Mich App at 522. No similar mandate exists for a trial court's disposition of pretrial evidentiary matters. *Oliver, supra*, 63 Mich App at 523.

Matters submitted to the trial court for resolution should be promptly determined—"[d]ecisions, when possible, should be made from the bench or within a few days of submission." Administrative Order 2003-7. In any event, a decision should be rendered no later than 35 days after submission. *Id*.

G. When Findings of Fact and Conclusions of Law Are Required

MCR 2.517(A)(1) requires that, in all actions tried without a jury or with an advisory jury, "the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." A court's decision should include "[b]rief, definite, and pertinent findings and conclusions on the contested matters . . . without overelaboration of detail or particularization of facts." MCR 2.517(A)(2). The requirement that a trial judge articulate the reasons for a decision in its findings of fact applies to criminal cases as well as civil cases. *People v Jackson*, 390 Mich 621, 627 (1973). A trial court's articulation of the law it applied to the facts of the case is designed to aid appellate review. *People v Johnson (On Rehearing),* 208 Mich App 137, 141 (1994). Findings are sufficient if it appears that the court

was aware of the issues and correctly applied the law. *People v Smith,* 211 Mich App 233, 235 (1995).

Findings of fact and conclusions of law are required in the following situations:

- bench trials, MCR 6.403;
- when there is joint representation of defendants, MCR 6.005(F)(3);
- directed verdicts (reasons required), MCR 6.419(D);
- when evidence of a criminal conviction is used for impeachment purposes, MRE 609;
- when sentencing a juvenile, MCR 6.931(E)(5);
- probation revocation, MCR 6.445(E)(2); and
- post-appeal evidentiary hearings, MCR 6.508(E).

H. Standard of Review

The court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion. *People v McCartney*, 72 Mich App 580, 589 (1976).

4.10 Motion to Suppress Evidence

MCR 2.119 Motion practice

MRE 104 Preliminary questions

A. Timing

Ordinarily a motion to suppress evidence must be made before trial; however, the trial court may permit such a motion during trial. *People v Ferguson*, 376 Mich 90, 93–94 (1965); *People v Gentner, Inc*, 262 Mich App 363, 368 (2004). The trial court need not permit an untimely motion to suppress when the factual circumstances giving rise to the issue were known to the defendant before trial and could have been raised in advance. *Ferguson, supra*, 376 Mich at 94–95.

B. Evidentiary Hearing

An evidentiary hearing is required where the admissibility of evidence is challenged on constitutional grounds and there are questions of fact. *People*

v Wiejecha, 14 Mich App 486, 488 (1968); *Jackson v Denno*, 378 US 368, 376–377 (1964) (voluntariness of confession).

The rules of evidence, except those relating to privileges, do not apply to evidentiary hearings. MRE 1101(b)(1).

If the parties so stipulate, a motion to suppress evidence may be decided on the basis of the information contained in a preliminary examination transcript. *People v Kaufman*, 457 Mich 266, 276 (1998). MCR 6.110(D).

C. Disposition

The court sits as the trier of fact in evidentiary hearings. *People v Yacks*, 38 Mich App 437, 440 (1972). Oral or written findings of fact and conclusions of law are required. *People v LaBate*, 122 Mich App 644, 647–648 (1983). Former GCR 1963, 517.1 (now MCR 2.517(A)(1)) provided:

> "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon."

According to the Court in *LaBate*, *supra*, 122 Mich App at 647, the language used in the court rule meant that a trial court was required to make a record of its findings of fact and conclusions of law in every case in which a dispute existed and the parties presented evidence to support the parties' positions. Specifically, the Court noted:

> "Clearly, the term 'actions' as used in GCR 1963, 517.1 contemplates a finding of fact and a statement of law in all contested matters where evidence is presented to the trial judge for his decision." *LaBate, supra*, 122 Mich App at 647.

D. Standard of Review

Generally, a trial court's factual findings at an evidentiary hearing are reviewed for clear error. *People v Marsack*, 231 Mich App 364, 372 (1998). This is the appropriate standard of review in such cases because the trial court is generally in a superior position to assess the evidence presented. *People v Zahn*, 234 Mich App 438, 445 (1999). Where, however, a trial court's decision is based "solely on the . . . preliminary examination transcript the trial court was in no better position than [the appellate court] to assess the evidence, and there is no reason to give special deference to the trial court's 'findings.'" *Zahn, supra*, 234 Mich App at 445–446.

The standard of review for all mixed questions of law and fact and for all pure questions of law is de novo. *Marsack*, *supra*, 231 Mich App at 372.

4.11 Motion to Suppress Defendant's Statement

CJI2d 4.1 Defendant's Statements as Evidence Against the Defendant

A. Admissibility

*See Chapter 2, Sections 2.39 and 2.40 for more information on hearsay.

Generally, a defendant's statement is admissible as non-hearsay under MRE 801(d)(2) or under the statement against interest exception to the hearsay rule, MRE 804(b)(3), if the declarant is unavailable as defined in MRE 804(a).* A defendant may be unavailable by exemption from testifying on the basis of his or her constitutional right to remain silent.

*See Chapter 2, Sections 2.18 and 2.28(E) for more information.

MRE 410* precludes the admission of statements made during plea discussions or in connection with a plea that was withdrawn. However, a statement can include testimony at a prior proceeding, including a guilty plea proceeding involving an unrelated crime. *People v Plato*, 114 Mich App 126, 134–135 (1981).

*See Chapter 2, Section 2.28(F).

A statement can also be used for impeachment under MRE 613(b),* the rule governing the use of a prior inconsistent statement when the statement is offered to prove inconsistency and not to show the truth of the matter asserted. See *People v Jenkins*, 450 Mich 249, 256–260 (1995).

B. Foundation

To offer a defendant's statement as extrinsic evidence of guilt, it must be shown that:

(1) the defendant made the statement to the witness;

(2) the statement provides admissions relating to the offense;

(3) there is corroborating evidence (the corpus delicti rule), *People v Konrad*, 449 Mich 263, 269–270 (1995);

(4) the statement was voluntary, *People v White*, 401 Mich 482, 500 (1977); and if raised

(5) that the defendant's statement was obtained without violating the defendant's constitutional rights.

The corpus delecti rule prohibits the use of a defendant's statement unless there is direct or circumstantial evidence independent of the statement establishing that a crime was committed; in the case of a homicide, there must be independent evidence that a person is dead as the result of criminal agency. *Konrad, supra*, 449 Mich at 269–270; *People v Ish*, 252 Mich App 115, 116 (2002).

See also *People v Williams*, 422 Mich 381, 388–392 (1985), for a discussion of the history and development of the corpus delicti rule.

C. Evidentiary ("*Walker*") Hearing

A defendant may move to suppress his or her statement, either because it was involuntary, or because it was otherwise obtained in violation of the defendant's constitutional rights. Hearings on the admissibility of confessions shall be conducted out of the hearing of the jury. MRE 104(c). If the accused testifies, he or she does not become subject to cross-examination on other issues in the case. MRE 104(d). The hearing is typically called a *Walker* hearing. *People v Walker (On Rehearing)*, 374 Mich 331, 338–339 (1965). With the exception of those regarding privilege, the rules of evidence do not apply to *Walker* hearings. MRE 104(a); *People v Richardson*, 204 Mich App 71, 80 (1994).

MRE 104(c) requires hearings outside the presence of the jury on other preliminary matters when the interests of justice so require or when an accused is a witness and requests that the hearing be conducted outside the presence of the jury.

1. Voluntary, Knowing, and Intelligent Confession

Statements made by a defendant during custodial interrogation are not admissible against the defendant unless he or she makes a voluntary, knowing, and intelligent waiver of his or her Fifth Amendment rights. *People v Howard*, 226 Mich App 528, 538 (1997).

> "Whether a waiver was voluntary and whether an otherwise voluntary waiver was knowingly and intelligently tendered form separate prongs of a two-part test for a valid waiver of *Miranda* rights. Both inquiries must proceed through examination of the totality of the circumstances surrounding the interrogation. The state has the burden of proving by a preponderance of the evidence that there was a valid waiver of the suspect's rights." *People v Abraham*, 234 Mich App 640, 644–645 (1999).

See also *People v Arroyo*, 138 Mich App 246, 258 (1984), for a comprehensive discussion and application of factors relevant to assessing the voluntariness of a defendant's confession. A waiver is "knowing and intelligent" if the suspect is aware of the nature of the rights being abandoned and the consequences of the decision to abandon them. *Moran v Burbine*, 475 US 412, 421 (1986) (the Court specifically addressed the issue of waiver in a case where the defendant was not informed that his sister had retained counsel for him and that counsel had contacted the police on his behalf).

The "valid waiver rule" of *Edwards v Arizona,* 451 US 477 (1981), does not apply to the subsequent interrogation of a suspect who was not held in continuous custody between his first interrogation, at which he requested counsel and denied involvement in the crime, and his second interrogation 11 days later, at which he acknowledged his right to counsel and implicated himself in the crime. *People v Harris*, 261 Mich App 44, 54 (2004). Notwithstanding the time that passed between interrogations in *Harris* and the fact that the defendant was not held in custody during that time, the Court found that the prosecution had established by a preponderance of the evidence that the defendant executed a valid waiver of his right to counsel at the second interrogation. *Harris, supra,* 261 Mich App at 55. Two police officers involved in the defendant's interrogation refuted the defendant's claim that he requested counsel at the second interrogation, and the prosecution's evidence included the defendant's videotaped acknowledgement of his right to counsel and a signed waiver of that right. *Harris, supra*, 261 Mich App at 47.

The Michigan Court of Appeals set forth four factors to consider in determining whether a defendant's statement was given voluntarily:

> "(1) the duration and conditions of detention,
>
> "(2) the attitude of the police towards the accused,
>
> "(3) the physical and mental state of the accused, and
>
> "(4) the diverse pressures which sap or sustain the accused's power of resistance or self-control." *People v Arroyo*, 138 Mich App 246, 256 (1984).

*Known as the "*Cipriano* factors."

In *People v Cipriano*, 431 Mich 315, 334 (1988), the Michigan Supreme Court elaborated on the four factors first discussed in *Arroyo*. According to the *Cipriano* Court, the following factors are relevant to determining whether a defendant's statement was voluntary:*

> (1) the age of the accused;
>
> (2) the accused's lack of education or intelligence level;
>
> (3) the extent of the accused's previous experience with the police;
>
> (4) the repeated or prolonged nature of the questioning;
>
> (5) the length of detention before the accused gave the statement;
>
> (6) lack of any advice to the accused regarding his constitutional rights;

> (7) an unnecessary delay in bringing the accused before a magistrate before the accused gave the confession;
>
> (8) whether the accused was injured, intoxicated, drugged, or ill when he gave the statement;
>
> (9) whether the accused was deprived of food, sleep, or medical attention;
>
> (10) whether the accused was physically abused; and
>
> (11) whether the accused was threatened with abuse. *Cipriano*, *supra*, 431 Mich at 334.

See also *People v Wells*, 238 Mich App 383, 389–390 (1999) (even where there was a factual dispute regarding the excessive force used to effectuate the defendant's arrest, a later confession given in a neutral setting is not necessarily involuntary if it is "sufficiently disconnected" from the initial violation).

One of the most influential personal characteristics of a suspect is his or her mental capacity. On numerous occasions, the United States Supreme Court has referred to the education and IQ of a suspect in finding that he or she was highly susceptible to coercion and that the police overpowered the suspect's will in obtaining an incriminating statement. See *Payne v Arkansas*, 356 US 560 (1958) (involved a 19-year-old "Negro" with a 5th grade education who was described as "mentally ill" and "slow to learn"); *Spano v New York*, 360 US 315 (1959) (involved a foreign-born defendant with a junior high education who was described as "emotionally unstable"); *Culombe v Connecticut*, 367 US 568 (1961) (involved a defendant with mental retardation); and *Chambers v Florida*, 309 US 227 (1940) (also involved the defendant's race).

Until recently, the United States Supreme Court had expressed strong distaste for the use of confessions from persons suffering from mental illness or retardation. *Blackburn v Alabama*, 361 US 199, 200–201 (1960). In *Colorado v Connelly*, 479 US 157 (1986), the Court concluded that a defendant's mental incompetence alone did not render the defendant's confession involuntary; for a confession to be involuntary, there must exist evidence of police misconduct or coercion. While psychological interrogation tactics may make a suspect's mental condition more significant, mental illness by itself and apart from its relation to official coercion should never decide the voluntariness question.

Police promises as well as police threats can make a statement involuntary. "[A] statement induced by a law enforcement official's promise of leniency is involuntary and inadmissible, if there was a promise of leniency and that promise caused the defendant to confess." *People v Conte*, 421 Mich 704, 712 (1984). To determine whether a promise of leniency exists requires an analysis of whether the defendant

reasonably understood the officer's statements to be a promise of leniency. *Id*. To determine whether the officer's promise of leniency caused the defendant to confess requires an analysis of whether the defendant relied on the promise when he or she decided to offer inculpatory evidence and whether, in fact, the promise of leniency prompted the defendant to make the incriminating statements. *Id*.

2. Inadmissible Confessions

Confessions obtained in violation of constitutional rights are not admissible. Possible challenges to the constitutionality of a defendant's confession include:

- A confession that results from an illegal arrest is inadmissible. Detention is unlawful where the police do not have probable cause to arrest the individual. *People v Mosley (After Remand)*, 400 Mich 181, 183 (1977). To determine whether the illegal arrest caused the confession, the court should consider the time between the illegal arrest and confession, whether the official misconduct was flagrant, whether there were intervening circumstances, and any events that occurred before the arrest. *People v Mallory*, 421 Mich 229, 243 n 8 (1984).

- A confession that results from unlawful detention is inadmissible. According to *People v Lewis*, 160 Mich App 20, 25 (1987), there must be a warrant or probable cause to arrest or the detention is illegal and "any evidence obtained as a result of that unlawful detention or any statement made while unlawfully detained must be suppressed." See also *People v Dowdy*, 211 Mich App 562 (1991), where an initial warrantless entry was unconstitutional but a defendant's statement was admissible because it was made after police had probable cause to arrest the defendant.

- A confession obtained during an unreasonable prearraignment delay is inadmissible. *Mallory*, *supra*, 421 Mich at 243; *People v White*, 392 Mich 404, 424 (1974).

  Although the "48 hour" rule established in *Riverside v McLaughlin*, 500 US 44 (1991),* forms a presumption of unreasonableness, the delay is only one factor to be considered in determining whether the statement was involuntary. *People v Manning*, 243 Mich App 615, 643 (2000).

*See Section 4.2(C) for more information.

- Confessions obtained in violation of the right to counsel are inadmissible. See *People v Anderson (After Remand)*, 446 Mich 392, 402–403 (1994). The failure of police to inform a suspect that counsel has been retained and is available before obtaining a confession precludes a knowing and intelligent waiver of the defendant's rights to counsel and to remain silent. *People v Bender*, 452 Mich 594, 597 (1996). But see *People v Sexton (After Remand)*, 461 Mich 746, 754 (2000), where the court found under the totality of the circumstances that the defendant's statements were not involuntary, even though the

defendant was not told during his interrogation that his attorney had requested to see him.

- Confessions obtained in violation of a defendant's Fifth Amendment privilege against compulsory self-incrimination are not admissible. *Miranda v Arizona*, 384 US 436, 474–476 (1966); *People v Hill*, 429 Mich 382, 394–395 (1987). *Miranda* warnings are constitutionally required and apply to the admissibility of statements made during custodial interrogations in both federal and state courts. *Dickerson v United States*, 530 US 428, 432, 442 (2000). If a defendant asserts his or her right to counsel, the police cannot talk to the defendant afterwards in the absence of counsel. If he or she asserts the right to remain silent, the police can ask the defendant later if he or she wants to talk. See *People v Roark*, 214 Mich App 421, 423 (1995).

  Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way, i.e., to a degree associated with a formal arrest. *Miranda, supra*, 384 US at 444; *Hill, supra*, 429 Mich at 391; *Zahn, supra*, 234 Mich App at 449. To determine whether the defendant was in custody, the court looks at the totality of circumstances with the key question being whether a reasonable person in the defendant's situation would have felt free to leave. This determination depends on the objective circumstances rather than the subjective perceptions of either the law enforcement officers or the defendant.

  Interrogation involves questioning or its functional equivalent which includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v Innis*, 446 US 291, 301 (1980).

  The *Miranda* rule does not apply in all its rigor to situations involving police questions reasonably prompted by a concern for public safety. *New York v Quarles*, 467 US 649, 656 (1984); *People v Attebury*, 463 Mich 662, 670 (2001).

  Individuals not acting on the government's behalf may not be required to give *Miranda* warnings before eliciting a statement. *People v Anderson*, 209 Mich App 527, 533–534 (1995) (a juvenile corrections officer whose job duties did not require the interrogation of suspects, who did not wear a badge or uniform or carry a gun, and who did not have authority to arrest or detain citizens, was not required to give a defendant *Miranda* warnings).

  A protective services caseworker not charged with enforcement of criminal laws and not acting on behalf of police, is not required to advise an individual of *Miranda* rights. *People v Porterfield*, 166 Mich App 562, 567 (1988). A private investigator is not required to warn individuals of

their constitutional rights before eliciting a statement. *People v Faulkner*, 90 Mich App 520, 525 (1979).

There is no requirement that a defendant's statement be recorded by audio or visual means. *People v Fike*, 228 Mich App 178, 186 (1998). Similarly, there is no requirement that an electronic recording be made when a defendant is informed of his or her *Miranda* rights. *People v Geno*, 261 Mich App 624, 627–628 (2004).

3. Use of Improper Confession

An involuntary statement may not be used for any purpose. *People v White*, 401 Mich 482, 498–501 (1977).

A statement taken in violation of a defendant's *Miranda* rights may be used in limited situations:

- Impeachment. *People v Starey*, 193 Mich App 19, 24–25 (1992).
- Testimony of witnesses discovered as a result of the *Miranda* violation. *People v Kusowski*, 403 Mich 653, 662 (1978).
- Physical evidence discovered as a result of the *Miranda* violation. *Kusowski, supra*, appears to support the idea that the exclusionary rule does not extend to "fruit" of *Miranda* violation. *Kusowski* suggests that a *Miranda* violation alone is not of the same constitutional magnitude as a violation of the Fourth Amendment so that suppression is not required. *Kusowski, supra*, 403 Mich at 660–661.

4. Assertion of *Miranda* Rights

A defendant's post-*Miranda* silence cannot be used against him or her during trial. *Doyle v Ohio*, 426 US 610, 618 (1976). An exception occurs when the defendant testifies at trial to a version different from the version reflected by that defendant's statement/silence. *People v Boyd*, 470 Mich 363, 374 (2004).

A defendant's due process rights were not violated where a witness inadvertently testified that after the defendant was given his *Miranda* warnings he refused to be questioned before speaking to his attorney. *People v Dennis*, 464 Mich 567, 577–578 (2001); *Greer v Miller*, 483 US 756, 764–765 (1987).

When a defendant invokes his or her Sixth Amendment right to counsel, any subsequent waiver of this right in a police-initiated custodial interview is ineffective; once invoked, a defendant's Sixth Amendment right to counsel may be waived only when the *defendant* initiates contact with the police officer *and* makes a valid waiver of his or her once-invoked right to counsel. *People v Harrington*, 258 Mich App 703, 706 (2003).

5. Waiver of *Miranda* Rights

A suspect may waive his or her *Miranda* rights. However, a waiver must be the "product of a free and deliberate choice, rather than intimidation, coercion, or deception." *Moran*, *supra*, 475 US at 421. That is, a waiver must be made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. A waiver need not be explicit, but can be determined by the surrounding facts and circumstances. *North Carolina v Butler*, 441 US 369, 374–376 (1979). A defendant who has waived his or her rights under *Miranda* may reassert them at any time.

While intoxication may preclude an effective waiver of *Miranda* rights, the fact that an individual is drugged does not automatically render that person's statement involuntary. *People v Lumley*, 154 Mich App 618, 624 (1986).

The prosecution has a "heavy burden" of proof that a suspect's waiver of his or her rights was voluntary, knowing and intelligent. The burden is satisfied if the prosecution proves the validity of the waiver by a preponderance of the evidence. *Colorado v Connelly*, 479 US 157, 184 (1986).

There is a distinction between determining whether a defendant's waiver of his or her *Miranda* rights was voluntary and whether an otherwise voluntary waiver was knowing and intelligent. *People v Garwood*, 205 Mich App 553, 555 (1994). A valid waiver of *Miranda* rights requires a showing that the waiver was voluntarily made—the result of the defendant's uncoerced choice—and that the waiver was made with complete awareness of the rights waived and the consequences of waiving those rights. *Id*.

6. Reassertion of Right to Remain Silent

"When a defendant speaks after receiving *Miranda* warnings, a momentary pause or even a failure to answer a question will not be construed as an affirmative invocation by the defendant of the right to remain silent." *People v McReavy*, 436 Mich 197, 222 (1990). After a valid waiver of the right to remain silent, a defendant must affirmatively reassert the right to remain silent. *People v Davis*, 191 Mich App 29, 36 (1991).

"[A] defendant's nonverbal conduct cannot be characterized as 'silence' that is inadmissible per se under the Michigan Constitution." *McReavy*, *supra*, 436 Mich at 222. However, in *People v Bigge*, 288 Mich 417, 420 (1939), the Court found that a defendant's failure to say anything in the face of an accusation is not admissible as an adoptive admission pursuant to MRE 801(d)(2)(B), unless the defendant manifests such an adoption.

D. Standard of Review

The reviewing court is required to examine the entire record and make an independent determination of the ultimate issue of voluntariness. *People v Robinson*, 386 Mich 551, 557 (1972). A trial court's ruling on voluntariness is reviewed for clear error. *Id*.

A trial court's determination that the entire context of a given pretrial statement is admissible to explain the statement is reviewable under the abuse of discretion standard. *People v Badour*, 167 Mich App 186, 191 (1988).

4.12 Motion to Suppress Identification of Defendant

MRE 901(b)(5) Voice Authentication or Identification

CJI2d 7.8 Identification

A. Generally

Identification testimony is admissible unless any pretrial identification procedure was impermissibly suggestive, or if impermissibly suggestive, considering the totality of the circumstances, it did not create a substantial risk of misidentification.*Manson v Braithwaite*, 432 US 98 (1977); *Neil v Biggers*, 409 US 188 (1972).

In assessing the reliability of the identification testimony in light of the suggestive identification procedure, the court must consider:

- The opportunity of the witness to observe the criminal at the time of the crime;
- The degree of attention of the witness at the time of the crime;
- The accuracy of the witness' prior description of the criminal;
- The level of certainty demonstrated by the witness at pretrial confrontation; and
- The length of time between the crime and the pretrial confrontation.

Manson, *supra,* 432 US at 114, 116.

Any discrepancy between complainant's initial description and defendant's actual appearance is relevant to the weight of such evidence, not to its admissibility. *People v Davis*, 241 Mich App 697, 705 (2000).

B. Evaluating the Lineup's Suggestiveness

A lineup may be so suggestive and conducive to irreparable misidentification that an accused is denied due process of law. *Stovall v Denno*, 388 US 293, 301–302 (1967). A court must consider the totality of the circumstances to determine whether an identification procedure is fair. *People v Kurylczyk*, 443 Mich 289, 311–312 (1993). The test is whether the procedure was so impermissibly suggestive that it renders the identification irreparably unreliable. *People v Davis*, 146 Mich App 537, 548 (1985).

If counsel was present at the lineup,* the defendant bears the burden of showing that the lineup was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 286 (1996). If defense counsel is not present at the pretrial identification procedure, the prosecution has the burden of establishing that the procedure was not impermissibly suggestive. *People v Young*, 21 Mich App 684, 693–694 (1970). If the prosecutor claims the defendant waived the right to have counsel present at the lineup, the burden is on the prosecutor to establish the waiver. *United States v Wade*, 388 US 218, 240 (1967).

*See subsection (C), below, for a discussion of the right to counsel at a lineup.

Where the difference in the lineup participants' physical appearances from the defendant's were minimized at the lineup and the store employees identified the defendant as the armed robber at both the lineup and in court and testified that differences in appearance did not influence their identification, there was no reversible error in the lineup identification. *People v Hornsby*, 251 Mich App 462, 466–467 (2002).

C. Right to Counsel

After initiation of adversary proceedings (by formal charge, preliminary hearing, indictment, information or arraignment), the Sixth Amendment guarantees an accused the right to counsel at all "critical stages" of a criminal proceeding. *People v Bladel (After Remand)*, 421 Mich 39, 52 (1984); *United States v Wade*, 388 US 218, 224 (1967). A defendant's right to counsel at corporeal identification procedures attaches at the time adversarial judicial proceedings are initiated against the defendant. *People v Hickman,* 470 Mich 602, 603 (2004).

The defendant does not have a right to have counsel present at a post-lineup interview of the complainant. *People v Sanger,* 222 Mich App 1, 4 (1997).

There is no right to counsel at precustodial investigatory photo lineups. *Kurylczyk, supra*, 443 Mich at 302.

In *People v Hickman,* 470 Mich 602, 609 n 4 (2004), the Michigan Supreme Court determined that the right to counsel for corporeal identification procedures attaches with the initiation of adversarial proceedings. However, the Court declined to address whether the defendant has the right to an attorney after the initiation of adversarial proceedings during a photographic lineup.

D. In-Court Identification

1. Pretrial Identification Challenged

*See *Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)*, (MJI, 2004).

A pretrial motion* to suppress an in-court identification by a witness may be brought if it is asserted that the identification is the product of a prior, illegal confrontation. For example, it may be claimed that the prior confrontation was the result of a lineup conducted after arrest and appointment of counsel without the presence of that counsel, *Wade, supra* at 236–237, or that the pretrial identification procedure was unnecessarily suggestive in some other manner, *Stovall v Denno*, 388 US 293 (1967); *Simmons v United States*, 390 US 377, 384 (1968). However, the Michigan Court of Appeals has declined to read the language in *Wade, supra*, regarding the unreliability of eyewitness testimony as a general proscription against the use of such testimony. *People v Davis*, 241 Mich App 697, 706 (2000).

2. Independent Basis for Identification

If the pretrial identification procedure violated the defendant's right to counsel or due process, then the prosecutor must establish by clear and convincing evidence that the in-court identification has a basis independent of the illegal procedure. *Wade, supra* at 240; *People v Colon*, 233 Mich App 295, 304 (1999).

The factors that courts should weigh when determining if an independent basis exists to admit an in-court identification:

(1) prior relationship with or knowledge of the defendant;

(2) opportunity to observe the offense, including length of time, lighting, proximity to the criminal act;

(3) length of time between the offense and the disputed identification;

(4) accuracy of description compared to the defendant's actual description;

(5) previous proper identification or failure to identify the defendant;

(6) any identification prior to lineup of another person as defendant;

(7) the nature of the offense including the age, intelligence, effect of any drugs on, and the psychological state of the victim; and

(8) any idiosyncratic or special features of the defendant. *People v Gray*, 457 Mich 107, 114–124 (1998); *People v Kachar*, 400 Mich

78, 95–97 (1977); *Colon, supra*, 233 Mich App at 304–305; *People v Johnson (On Remand)*, 180 Mich App 423, 426 (1989).

A defendant is not entitled to an evidentiary hearing on suggestiveness simply by making a vague claim of suggestiveness. *People v Johnson*, 202 Mich App 281, 286–287 (1993). Generally the use of surveillance photographs or videos of the actual events surrounding an offense are not impermissibly suggestive. *Kurylczyk*, *supra*, 443 Mich at 309–310.

E. Defendant's Request for a Lineup

A defendant is not entitled to a corporeal line-up as a matter of right. *People v McAllister*, 241 Mich App 466, 471 (2000); *People v Buchanan*, 107 Mich App 648 (1981). A trial court has discretion to grant a defendant's motion for a lineup. *Id.* A right to a lineup arises when eyewitness identification has been shown to be a material issue and when a lineup would likely resolve any reasonable likelihood of mistaken identification. *Id.* Where the defendant meets his or her requisite burden, he or she has a due process right to a lineup. *People v Gwinn*, 111 Mich App 223, 248 (1981). The *Gwinn* Court indicated that in determining whether the defendant's due process rights have been implicated, the court should consider the benefits of a lineup to an accused, the burden on the prosecution, police, courts, and witnesses, and the timeliness of the motion involved. *Gwinn*, *supra*, 111 Mich App at 249.

F. Photo Lineup

A photo lineup should not be used if a suspect is in custody or if the suspect could be compelled to take part in a corporeal lineup. *People v Strand*, 213 Mich App 100, 104 (1995); *Kurylczyk*, *supra*, 443 Mich at 298.

The same standard of "unduly suggestive" applies to photo lineups as well as corporeal lineups:

> "A suggestive lineup is not necessarily a constitutionally defective one. Rather, a suggestive lineup is improper only if under the totality of the circumstances there is a substantial likelihood of misidentification. The relevant inquiry, therefore, is not whether the lineup photograph was suggestive, but whether it was unduly suggestive in light of all the circumstances surrounding the identification. [Citations omitted.]" *Id.* at 306.

"A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111 (1998).

*See Chapter 2, Section 2.14 for a discussion of MRE 404.

Mug shots, unless edited, are not admissible since they may suggest bad character, MRE 404,* or a past criminal record. *People v Heller*, 47 Mich App

408, 411 (1973), *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 202 (1998).

G. On-Scene Identification

A defendant's right to counsel at corporeal identifications attaches at the time adversarial judicial criminal proceedings are initiated against that defendant. *Hickman*, *supra*, 470 Mich at 603. In *Hickman*, the challenged identification took place "on-the-scene" and before the initiation of adversarial proceedings; therefore, counsel was not required. The Michigan Supreme Court's decision in *Hickman* overruled the Court's previous decision in *People v Anderson*, 389 Mich 155 (1973), where "the right to counsel was extended to all pretrial corporeal identifications, including those occurring before the initiation of adversarial proceedings." *Hickman, supra*, 470 Mich at 605. Both the federal and state constitutional provisions on which a criminal defendant's right to counsel are based are prefaced by the phrase, "In all criminal prosecutions, ..." Said the *Hickman* Court:

> "[I]t is now beyond question that, for federal Sixth Amendment purposes, the right to counsel attaches only at or after the initiation of adversarial judicial proceedings.
>
> "This conclusion is also consistent with our state constitutional provision, Const 1963, art 1, § 20[.]" *Id.* at 607–608.

The Court added that "identifications conducted before the initiation of adversarial judicial criminal proceedings could still be challenged" on the basis that a defendant's due process rights were violated by the identification's undue suggestiveness or by other factors unfairly prejudicial to the defendant. *Id.*

In *People v Wilkerson*, 63 Mich App 470, 472–473 (1975), the Court upheld an identification that occurred immediately after apprehension, even though the apprehension occurred one month after the crime.

In *People v Libbett*, 251 Mich App 353, 361–363 (2002), the Court of Appeals concluded that an on-scene identification was not improper because only two hours lapsed between the crime and identification, and only 30 minutes had lapsed between defendant's arrest and his identification.

H. Identification of Defendant's Voice

1. Voice Identification Lineup

A defendant can be required to speak during a lineup to determine if his or her voice is recognized. *People v Hays*, 126 Mich App 721, 725 (1983). Care should be taken to determine that there is a basis for familiarity with a voice and a reasonably positive identification. *Id*. at 725–726; *People v Bozzi*, 36 Mich App 15, 18–22 (1971).

Even where a defendant is not entitled to have counsel present during a victim's voice identification, the identification must still be suppressed if it is unduly suggestive. *People v Williams*, 244 Mich App 533, 542 (2001) (a tape recording containing three voices, two of which were identified as police officers, was unduly suggestive).

2. Voice Demonstration

Testimony cannot be compelled and the courts have attempted to distinguish between something like a demonstration and testimony which would violate the prohibition against self-incrimination. See *Schmerber v California*, 384 US 757 (1966) and *Doe v United States*, 487 US 201 (1988), along with *Pennsylvania v Muniz*, 496 US 582 (1990).

Neither the Fourth or Fifth Amendment provides protection for what a person knowingly exposes to the public such as facial characteristics, handwriting, and the characteristics of one's voice, *People v Henderson*, 69 Mich App 418 (1976). In that case, the Court indicated voice exemplars could be used to measure the physical properties of the voice. *Id.* at 421.

Generally, the admission of demonstrative evidence rests with the sound discretion of the trial judge. *People v Bailey*, 175 Mich App 743, 746 (1989).

I. Identification of Objects

In *People v Miller (After Remand)*, 211 Mich App 30, 40–41 (1995), the Court held that the procedures relating to corporeal lineups are not applicable to the identification of objects and that any suggestiveness in the identification of evidence is relevant to the weight rather than the admissibility of the evidence.

J. Standard of Review

A trial court's decision to admit identification evidence is reviewed for clear error. *Kurylczyk*, *supra*, 443 Mich at 303; *People v Harris*, 261 Mich App 44, 51 (2004). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *Harris, supra*, 261 Mich App at 51.

The trial court's decision to admit an in-court identification is also reviewed for clear error. *People v McAllister*, 241 Mich App 466, 472 (2000), remanded in part on other grounds, 465 Mich 884 (2001). The trial court's findings of fact pertaining to motions to suppress identification evidence are reviewed for clear error. *Gray*, *supra*, 457 Mich at 115.

4.13 Competency Determination

MCR 6.125 Mental competency hearing

MCL 330.2020 *et seq*. Competency, presumption; incompetency, determination; medication

A. General Test

A criminal defendant is presumed competent to stand trial unless

> "he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. The court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during trial." MCL 333.2020(1).

See also *People v Mette*, 243 Mich App 318, 331 (2000); *People v Harris*, 185 Mich App 100, 102 (1990).

The defendant has the burden of proving incompetence. MCL 330.2020(1). A defendant's competence may be based on the defendant's medicated state. MCL 330.2020(2).

A defendant is not incompetent when medication makes the defendant competent, even if the defendant would be incompetent without the medication. MCL 330.2020(2).

The standard for competency to plead guilty is the same as that for competency to stand trial. *Godinez v Morin,* 509 US 389, 396–397 (1992); *People v Matheson*, 70 Mich App 172, 179 (1976).

B. Juveniles

Before a juvenile is subjected to the adjudicative phase of the delinquency proceeding, the juvenile has a due process right to have the family court determine his or her mental competency using the Mental Health Code's provisions as guidance. *In re Carey*, 241 Mich App 222, 233–234 (2000).

C. Raising the Issue of Competence

The question of competency to stand trial may be raised by either party or the court; the procedure for raising the issue is governed by court rule. MCL 333.2024. A defendant is entitled to a competency hearing when evidence demonstrates a bona fide doubt as to his competency. *People v Harris*, 185 Mich App 100, 102 (1990). In fact, the trial court is obligated to raise the issue of the defendant's competence when "facts are brought to its attention which raise a 'bona fide doubt' as to the defendant's competence." *Id*.; *People v Whyte*, 165 Mich App 409, 414 (1988).

The issue of competency can be raised at any time during the proceedings against a defendant. MCR 6.125(B). "[C]ompetency is an ongoing matter appropriately raised" at any time evidence of incompetence arises. *Whyte*, *supra*, 165 Mich App at 414.

D. Order for Examination

A trial court must order a competency examination "[u]pon a showing that the defendant may be incompetent to stand trial[.]" MCL 330.2026(1). The decision whether to refer a defendant for psychiatric testing is within the discretion of the trial court. *Whyte*, *supra*, 165 at 412.

The examination must be conducted "by a certified or licensed examiner of the center for forensic psychiatry or other facility officially certified by the department of mental health to perform examinations relating to the issue of competence to stand trial." MCR 6.125(C)(1). On a showing of good cause, the court may order an independent examination. MCR 6.125(D).

E. Hearing

A competency hearing must be held within five days of the court's receipt of the examiner's report or on conclusion of the proceedings then before the court, whichever is sooner, unless on a showing of good cause, an adjournment is granted. MCR 6.125(E); MCL 330.2030(1).

If the defendant is found incompetent to stand trial, the court must determine whether there is a substantial probability that, if provided treatment, the defendant will attain competence to stand trial within 15 months or within a period of one-third of the maximum possible sentence the defendant could receive if convicted of the offense. MCL 330.2031(2); MCL 330.2034(1).

F. Commitment for Treatment

The court may direct the prosecutor to file a petition asserting that the defendant requires treatment if the court concludes there is not a substantial probability that the defendant will attain competence with treatment during the required time period. MCL 330.2031; MCL 330.2034(1). If the court determines there is a substantial probability that treatment will enable the defendant to attain competency, the court can order treatment and commit the defendant to the custody of the department of mental health for that purpose. MCL 330.2032(3). The court must receive treatment reports as required by MCL 330.2038. The court is required to redetermine the issue of the defendant's competency to stand trial after the receipt of each report, unless the defendant waives a hearing and redetermination. MCL 330.2040(1).

The defendant may not be detained in excess of 15 months, a term longer than one-third of the sentence possible for conviction of the offense, or after charges against the defendant have been dismissed. MCL 330.2034(1). The

15-month period begins on the date at which the hearing determining the defendant's incompetence was held. *People v Bowman*, 141 Mich App 390, 398–399 (1985).

> "[A] trial court's failure to dismiss the charges against a defendant does not deprive the trial court of jurisdiction, nor does a violation of [MCL 330.2044(1)(b)], standing alone, furnish a basis on which to reverse an otherwise valid conviction. Absent a claim of prejudice to the defendant's substantive rights, failure to dismiss is a procedural violation on which reversal may not be predicated." *People v Miller*, 440 Mich 631, 633 (1992).

G. Motions During Defendant's Incompetence

MCR 6.125(F) provides that pretrial motions may be heard and decided while a defendant is incompetent if the defendant's presence is not essential to a fair hearing and decision. See also MCL 330.2022(2).

H. Dismissal

If a defendant is determined to be incompetent to stand trial, the charges shall be dismissed when the prosecutor notifies the court of his intention not to prosecute the case or after 15 months have passed since the date on which defendant was originally determined incompetent to stand trial. MCL 330.2044(1). The 15 months of incompetence need not be continuous. *Miller*, *supra*, 440 Mich at 641–642. Charges may be reinstated against a defendant within the time frames and circumstances provided by MCL 330.2044(2), (3), and (4).

I. Statements to Examiner

MCL 768.20a(5) provides:

> "Statements made by the defendant to personnel of the center for forensic psychiatry, to other qualified personnel, or to any independent examiner during an examination shall not be admissible or have probative value in court at the trial of the case on any issues other than his or her mental illness or insanity at the time of the alleged offense."

See also *People v Toma*, 462 Mich 281, 292–293 (2000) (the statutory prohibition against using a defendant's statement to a mental health professional "is a clear expression by the Legislature that these statements cannot be admitted at trial except on the issue of insanity[.]").

J. Standard of Review

The determination of a defendant's competency is reviewed for an abuse of discretion. *People v Garfield*, 166 Mich App 66, 73 (1988); *People v Ritsema,* 105 Mich App 602, 606 (1981).

The trial court's failure to sua sponte raise the issue of incompetence is reviewed for abuse of discretion. *Whyte*, *supra*, 165 Mich App at 412.

4.14 Double Jeopardy

US Const, Am V

Const 1963, art 1, §15

MCL 763.5 Acquittal on facts and merits as bar to subsequent prosecution

MCL 768.33 Offenses consisting of different degrees; subsequent trial prohibited

A. Generally

The double jeopardy clause prohibits successive prosecutions for the same offense and multiple punishments for the same offense. Whether a case is barred by the double jeopardy clause is typically raised by a motion to dismiss.

Where multiple punishments are involved, the Double Jeopardy Clause acts as a restraint on the prosecutor and the courts, not the Legislature. *Brown v Ohio*, 432 US 161, 165 (1977). Where the issue is one of multiple punishments rather than successive trials, the double jeopardy analysis is whether there is a clear indication of legislative intent to impose multiple punishments for the same offense. If so, there is no double jeopardy violation. *People v Robideau*, 419 Mich 458, 469 (1984).

A claim of double jeopardy based on the single transaction test is waived when a defendant pleads guilty to one of two or more charges knowing that the prosecutor plans to proceed to trial on the remaining charges. *People v Plato*, 114 Mich App 126, 133 (1981).

B. Multiple Prosecutions for the Same Offense

Same Elements Test. The Michigan Supreme Court readopted the "same-elements" test to determine whether the prohibition against double jeopardy is violated when multiple charges are brought against a defendant for conduct related to a single criminal transaction. *People v Nutt*, 469 Mich 565, 567–568 (2004). In *Nutt*, the Court overruled its decision in *People v White*, 390 Mich

245 (1973), where the Court disapproved of the "same-elements" test in favor of the "same transaction" test as the means of resolving double jeopardy issues. The "same transaction" test generally prohibited serial prosecutions of a defendant for entirely different crimes arising from a single criminal episode or "transaction." *Nutt, supra*, 469 Mich at 567–568. Until the *White* decision in 1973, Michigan courts had interpreted the prohibition against double jeopardy as precluding multiple prosecutions of a defendant for crimes involving identical elements. *Id*.

Michigan's return to the same-elements test signifies a return to "the well-established method of defining the Fifth Amendment term 'same offence'" known as the *Blockburger* test. *Nutt, supra*, 469 Mich at 576; *Blockburger v United States*, 284 US 299, 304 (1932). The *Blockburger* test "focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Nutt, supra*, 469 Mich at 576, quoting *Iannelli v United States*, 420 US 770, 785 n 17 (1975).

The same-elements test, as dictated directly by the *Blockburger* Court, provides:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger, supra*, 284 US at 304; *Nutt, supra*, 469 Mich at 577–578.

Convictions for both felony-murder and the underlying felony violate the prohibition against double jeopardy. Where the defendant was convicted of assault with intent to commit armed robbery and the defendant's felony-murder conviction was based on the same assault conviction, the defendant's conviction and sentence for the underlying felony must be vacated. *People v Akins*, 259 Mich App 545, 568 (2003).

PPOs and Double Jeopardy. In the case of PPO violations, the Michigan Legislature has clearly indicated its intent that criminal contempt sanctions be imposed in addition to whatever other criminal penalties may apply for a separate criminal offense.* MCL 600.2950(23); MCL 600.2950a(20); *People v Coones*, 216 Mich App 721, 727–728 (1996).

*See Section 8.12, *Domestic Violence Benchbook (Third Edition)*, (MJI, 2004), for more information.

Successive State and Federal Prosecutions. The Double Jeopardy Clause does not preclude a state court from trying a defendant when the defendant was previously convicted in federal court on charges stemming from the same criminal exploits. *People v Childers*, 459 Mich 216, 217 (1998). This is especially true when the interests of the state differ from those of the federal court and the state's interests are not satisfied by the federal court prosecution. *Id.* at 219.

C. Multiple Punishments for the Same Offense

There is no double jeopardy violation where a defendant receives multiple punishments for the same offense when the legislative intent explicitly provides for the multiple punishments. *People v Mitchell*, 456 Mich 693, 695–696 (1998). The Michigan Supreme Court distinctly held that the Michigan Legislature intended to allow multiple punishments for a defendant charged pursuant to the felony-firearm statute and charged with a felony not expressly excepted from the felony-firearm statute. *Id.* at 698. See *People v Price*, 214 Mich App 538, 542 (1996); *People v Sturgis*, 427 Mich 392, 398–403 (1986).

D. Standard of Review

A double jeopardy issue is a question of law reviewed de novo on appeal. *People v Lugo*, 214 Mich App 699, 705 (1996).

4.15 Entrapment

A. Generally

Michigan has long recognized the defense of entrapment. *People v Sinclair*, 387 Mich 91, 116 (1972).

> "The overall purpose of the entrapment defense is to deter the corruptive use of governmental authority by invalidating convictions that result from law enforcement efforts that have as their effect the instigation or manufacture of a new crime by one who would not otherwise have been so disposed." *Id*.

B. Not an Issue of Guilt or Innocence

A defendant's claim of entrapment does not require an assessment of the defendant's guilt or innocence of the crime charged. In this respect, the entrapment defense differs from other defenses such as insanity and self-defense. *People v White*, 411 Mich 366, 387 (1981). Rather, entrapment is a defense that argues against any prosecution of the defendant's conduct, and in that respect, entrapment is like a jurisdictional defect that is not waived, for example, by a defendant's guilty plea. *Id*. But note that a defendant's *untimely* claim of entrapment *is* waived by an unconditional guilty plea. *People v Crall*, 444 Mich 463, 464–465 (1993).

The entrapment defense requires the presentation of evidence that is collateral to the commission of the crime and that justifies the dismissal of charges against the defendant claiming he or she was entrapped. *People v Juillet*, 439 Mich 34, 52 (1991); *People v D'Angelo*, 401 Mich 167, 179 (1977).

C. Hearing

*See Section 4.11(C) for more information.

When the defendant raises the issue of entrapment, whether before or during trial, the trial court must conduct an evidentiary hearing in the jury's absence, procedurally similar to a *Walker* hearing* in cases involving statements attributable to the defendant. *D'Angelo, supra,* 401 Mich at 177–178. The defendant has the burden of proving the claim of entrapment by a preponderance of the evidence. *Id*. at 183.

When deciding whether the defendant has established the defense of entrapment, the trial court should make specific findings of fact. Should the trial court find that the defendant has proved the claim of entrapment, the related charge must be dismissed; if the defendant has failed to prove entrapment, the prosecution may proceed. *Id*.

D. Test for Entrapment

The test for entrapment in Michigan is an objective one to determine whether the actions of the police were so reprehensible under the circumstances that a conviction should not be permitted to stand. *People v Jamieson,* 436 Mich 61, 80 (1990).

In *People v Juillet*, 439 Mich 34 (1991), the Michigan Supreme Court discussed entrapment in detail and two tests have emerged from that case:

> "Under the current entrapment test in Michigan, a defendant is considered entrapped if either (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances or (2) the police engaged in conduct so reprehensible that it cannot be tolerated. However, where law enforcement officials present nothing more than an opportunity to commit the crime, entrapment does not exist. [Internal citations omitted.]" *People v Johnson*, 466 Mich 491, 498 (2002)

1. Summary of *Juillet's* Objective Test

Juillet, supra, consisted of two consolidated cases in which the Court considered the question whether the defendant in each case established the defense of entrapment. The decision in *Juillet* represents the Michigan Supreme Court's reaffirmation of the "objective" test for entrapment as the test was defined and applied in *Jamieson, supra*, 436 Mich 61.

The objective test for entrapment "focuses primarily on the investigative and evidence-gathering procedures used by the governmental agents," while the subjective test "focuses on the defendant's predisposition or motivation to commit a new crime." *Juillet, supra*, 439 Mich at 53. According to the Court, the objective test asks a fundamental question: whether it is probable and likely that the police conduct at issue will result

in the instigation of criminal activity rather than the detection of such activity. *Jamieson, supra*, 436 Mich at 77; *Juillet, supra*, 439 Mich at 54.

As applied to the defendant in *People v Brown*, one of the consolidated cases in *Juillet*, the Court determined that the defendant failed to establish his claim of entrapment:

> "Under the objective test of entrapment, we cannot say that the government's activities, although involving questionable conduct, would induce a normally law-abiding citizen, in Brown's circumstances, to commit the crimes with which he was charged." *Juillet, supra*, 439 Mich at 41.

As applied to the defendant in *People v Juillet*, the other consolidated case, the Court determined that the defendant succeeded in establishing his claim of entrapment:

> "The police activity in this case did have the likely effect of inducing a normally law-abiding person, in Juillet's circumstances, to elevate his drug use to that of drug delivery. Additionally, the police conduct was reprehensible with regard to Juillet in that they manufactured the criminal conduct." *Juillet, supra*, 439 Mich at 42.

2. The "Normally Law-Abiding Person"

This part of the entrapment test considers the "willingness" of the accused to commit the criminal act as that "willingness" compares to how a normally law-abiding person would react in similar circumstances. *Juillet, supra*, 439 Mich at 54. A "normally law-abiding person" is a "person not ready and willing to commit" the crime charged. *Id*. This analysis considers the effect the police conduct would likely have on a normally law-abiding person under circumstances similar to those experienced by the defendant. *Id*. at 55. The objective nature of the test precludes consideration of the defendant's prior criminal activity if it was unrelated to the offense charged. *Id*. at 56.

3. Government's Conduct

This part of the test identifies and evaluates the governmental activity that occurred in relation to the crime charged but does not recognize entrapment on the basis of per se "reprehensible" conduct. That is, "[n]ot all generally offensive police conduct will necessarily support a claim of entrapment." *Id*. Thus, the trial court must determine whether the governmental conduct at issue had the effect of causing a person not otherwise disposed to criminal conduct to commit the crime charged. *Juillet, supra*, 439 Mich at 61–62.

For this portion of the test, the court should examine the following factors to determine whether the governmental activity manufactured the crime (the list of relevant factors is not intended to be exhaustive):

- Whether the government agents made any appeals to the defendant's sympathy as a friend;
- Whether the defendant had been known to commit the crime with which he or she was charged;
- Whether there were any long time lapses between the investigation and the defendant's arrest;
- Whether any inducements or offers of excessive consideration or enticements were made that would make commission of the crime unusually attractive to a hypothetical law-abiding citizen;
- Whether the defendant was guaranteed that the acts alleged as crimes were not illegal;
- Whether and to what extent any government pressure existed;
- Whether sexual favors were involved;
- Whether the government agents threatened arrest;
- Whether government procedures existed that tended to escalate the criminal culpability of the defendant;
- Whether the government had a significant type or amount of control over an informant; and
- Whether the investigation was targeted or untargeted. *Juillet, supra*, 439 Mich at 56–57; *Jamieson, supra*, 436 Mich at 73–74.

See also *People v Johnson*, 466 Mich 491, 498–499 (2002).

E. Entrapment by Estoppel

Entrapment by estoppel applies "[w]hen a citizen reasonably and in good faith relies on a government agent's representation that the conduct in question is legal, under circumstances where there is nothing to alert a reasonable citizen that the agent's statement is erroneous[.]" *People v Woods*, 241 Mich App 545, 548 (2000). The due process principle underlying the doctrine of entrapment by estoppel is fairness to a well-intentioned citizen who unwittingly breaks the law while relying on government agents' statements under circumstances where reliance is reasonable. *Id*. "However, when a citizen who should know better unreasonably relies on the agent's erroneous statement, or when the 'statement' is not truly erroneous, but just vague or contradictory, the defense is not applicable." *Id*. at 548–549.

The entrapment by estoppel defense applies where the defendant establishes by a preponderance of the evidence that (1) a government official (2) told the defendant that certain criminal conduct was legal, (3) the defendant actually relied on the government official's statements, (4) and the defendant's reliance was in good faith and reasonable in light of the identity of the government official, the point of law presented, and the substance of the official's statement. See *Woods*, *supra,* 241 Mich App at 558, quoting *United States v West Indies Transport, Inc*, 127 F3d 299, 313 (CA 3, 1997).

F. Standard of Review

A trial court's finding of entrapment is reviewed for clear error. *People v Johnson*, 466 Mich 491, 497 (2002).

4.16 Expert Witness—Court Appointed

MCL 775.15 Accused unable to procure witness; subpoena, fees

MRE 706 Court-appointed experts

A. Authority

> "MCL 775.15 authorizes payment of the fees for an expert witness, provided the accused is able to show that there is a material witness in his favor within the jurisdiction of the court without whose testimony he cannot safely proceed to trial." *People v Jacobsen*, 448 Mich 639, 641 (1995).

However, "[w]ithout an indication that expert testimony would likely benefit the defense, it is not error to deny without prejudice the motion for appointment of an expert witness." *Id*. at 641. To have an expert appointed at public expense, a defendant must demonstrate a nexus between the facts of the case and the need for an expert. It is not enough to show a mere possibility of assistance from the requested expert. *People v Tanner*, 469 Mich 437, 443 (2003); *People v Leonard*, 224 Mich App 569, 582 (1997).

The appointment of an expert is statutorily mandated in certain situations such as the defense of insanity, MCL 768.20a(3) and prosecution for being a sexually delinquent person, MCL 767.61a. Interpreters are also required for those who cannot understand or speak English, MCL 775.19a, and those who are deaf, MCL 393.503.

B. Expert's Report

The court may not have the authority to require a defense expert to prepare a report because this would require the expert to disclose his or her unwritten observations.

C. Independent Examination

There is no inherent right to conduct an independent scientific examination with an expert of one's own choice. *People v Bell*, 74 Mich App 270, 275 (1977). Generally, a trial court's denial of criminal discovery is not reversible if defendant is afforded full opportunity of cross-examination. *People v Anderson*, 88 Mich App 513, 516–517 (1979).

D. Standard of Review

A trial court's decision on an indigent defendant's motion for the appointment of an expert witness is reviewed for an abuse of discretion. *Tanner, supra*, 469 Mich at 442.

4.17 Change of Venue

MCL 762.7 Change of venue; procedure, saving clause

A. Generally

Venue in a criminal case may be changed "upon good cause shown by either party." MCL 762.7. The defendant or prosecutor can move for a change of venue. Generally, defendants must be tried in the county where the crime is committed. MCL 600.8312.

The moving party has the burden to show good cause for a change of venue. MCL 762.7; *People v Ranes*, 63 Mich App 498, 503–504 (1975). The focus is on whether the moving party can secure a fair and impartial trial in the jurisdiction where the action is brought. *In re Attorney General*, 129 Mich App 129, 133 (1983). Convenience of the parties and witnesses does not constitute good cause. *Id*. at 135.

Even though the effects of a crime may extend to more than one county, venue is not proper in a county where none of the criminal acts necessary to the commission of the crime occurred. *People v Webbs*, 263 Mich App 531, 534 (2004).

Where potential jurors can swear that they will put aside preexisting knowledge and opinions about the case and that they will be able to try the case impartially based on the evidence at trial, such preexisting knowledge and opinions do not constitute good cause justifying a change of venue. *People v DeLisle*, 202 Mich App 658, 662–663 (1993).

> "Federal precedent has used two approaches to determine whether the failure to grant a change in venue is an abuse of discretion. Community prejudice amounting to actual bias has been found where there was extensive highly inflammatory pretrial publicity

that saturated the community to such an extent that the entire jury pool was tainted, and, much more infrequently, community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice." *People v Jendrzejewski*, 455 Mich 495, 500–501 (1997).

B. Timing

The trial court can defer ruling on a motion for change of venue until after jury selection has been attempted in the original county. *People v Jancar*, 140 Mich App 222, 229–230 (1985).

A district court does not have authority to order a change of venue in a felony case. *In re Attorney General, supra*, 129 Mich App at 131–132.

C. Standard of Review

A trial court's ruling on a motion for change of venue is reviewed for an abuse of discretion. *Jendrzejewski, supra,* 455 Mich at 500. A trial court's determination regarding venue in a criminal prosecution is reviewed de novo on appeal. *People v Fisher*, 220 Mich App 133, 145 (1996); *Webbs, supra*, 263 Mich App at 533.

4.18 Separate or Joint Trial

MCR 6.120 Joinder and severance; single defendant

MCR 6.121 Joinder and severance; multiple defendants

MCL 768.5 Defendants jointly indicted; separation of trials

CJI2d 2.19 Multiple Defendants—Consider Evidence and Law As It Applies to Each Defendant

CJI2d 3.7 Multiple Defendants

A. One Defendant—Multiple Charges

Either the defendant or the prosecutor may move to sever separate counts that have been joined against the same defendant under MCR 6.120. The court may sever offenses on its own initiative, but either party may object to severance. MCR 6.120(C).

Whether to join or sever offenses depends on what is appropriate "to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense." MCR 6.120(C). "It is usually in the prosecution's interest to show substantial criminal activity by a defendant, and it is usually

in the defendant's interest to restrict such proofs." *People v McCune*, 125 Mich App 100, 104 (1983).

Joinder or severance is discretionary under MCR 6.120(A) and (C). *People v Miller*, 165 Mich App 32, 44–45 (1987); *People v Tobey*, 401 Mich 141, 150–151 (1977). MCR 6.120(C) sets forth relevant factors the court should consider to determine whether to join or sever offenses:

- the timeliness of the motion
- the drain on the parties' resources
- the potential for confusion or prejudice because of the number of charges or the complexity and nature of the evidence
- the potential for harassment
- convenience to the witnesses
- readiness for trial

Two or more offenses are related offenses if they are based upon the same conduct, upon a single criminal episode, or upon a common plan. *McCune, supra*, 125 Mich App at 103; MCR 6.120(B)(1)–(2).

On the defendant's motion, a trial court must sever unrelated offenses for separate trials. MCR 6.120(B). Offenses are not related if they are based on different conduct or if they are based on a series of disconnected acts or acts not constituting part of a single episode or plan. MCR 6.120(B)(1)–(2).

B. Multiple Defendants

On a defendant's motion, the court must sever unrelated offenses. MCR 6.121(B). The court has discretion whether to require separate or joint trials for two or more defendants jointly indicted for a criminal offense. MCL 768.5; *People v Hana*, 447 Mich 325, 331 (1994), amended 447 Mich 1203 (1994). Michigan law strongly favors joint trials and a decision to join or consolidate two cases will not be reversed on appeal absent a showing of prejudice to an accused's substantial rights. *People v Carroll*, 396 Mich 408, 414 (1976); *People v Stricklin*, 162 Mich App 623, 630 (1987); *People v Bailey*, 104 Mich App 146, 152 (1981); *People v Moore*, 78 Mich App 294, 300 (1977). See also *People v Schram*, 378 Mich 145 (1966), where the Court held two cases could be consolidated for trial where there were separate informations and the defendants were arrested, arraigned, examined, and informed against at different times so long as the consolidation did not prejudice the substantial rights of a defendant.

Joinder of distinct criminal charges is allowed when (1) there is a significant overlap of issues or evidence, (2) the charges represent a series of events, and (3) there is a "substantial interconnection" between the defendants, the proofs,

and the factual and legal bases of the crimes charged. *Stricklin, supra*, 162 Mich App at 630.

Because it is not uncommon in a multi-defendant trial for a codefendant's attorney to "stand in" when defense counsel is absent for a brief period, the judge must determine on the record that the defendant knowingly and intelligently accepts substitute counsel on those occasions. *Olden v United States*, 224 F3d 561, 568–569 (CA 6, 2000).

If defendants are tried jointly, there are required jury instructions. CJI 2d 2.19 or CJI 2d 3.7 must be given when two or more defendants are tried together. Both instructions caution the jury about considering the law and the evidence as it applies to each defendant. The instructions read:

> "(1) There is more than one defendant in this case. The fact that they are on trial together is not evidence that they were associated with each other or that either one is guilty.
>
> "(2) You should consider each defendant separately. Each is entitled to have [his/her] case decided on the evidence and the law that applies to [him/her].
>
> "[(3) If any evidence was limited to (one defendant/some defendants) you should not consider it as to any other defendants.]

A defendant has no right to a separate trial; in fact, judicial economy favors joint trials. *People v Hoffman*, 205 Mich App 1, 20 (1994).

Severance is mandated under MCR 6.121(C) only when a defendant moves for severance and demonstrates that severance is necessary to prevent prejudice to the defendant's substantial rights. *Hana*, *supra*, 447 Mich at 331. A defendant is entitled to a separate trial where it appears a codefendant may testify to exculpate himself or herself and incriminate the defendant. *People v Hurst,* 396 Mich 1, 4 (1976); *People v Hicks*, 185 Mich App 107, 117 (1990). This rule does not apply to bench trials. *People v Butler*, 193 Mich App 63, 66 (1992). To warrant severance, defenses must be not only inconsistent, but also mutually exclusive or irreconcilable. *People v Cadle (On Remand)*, 209 Mich App 467, 469 (1995).

The use of dual juries as an alternative to severance. A dual-jury procedure may be used to avoid the problems arising with a joint trial of defendants with antagonistic defenses. *Hoffman*, *supra*, 205 Mich App at 19; *People v Greenberg*, 176 Mich App 296, 304 (1989). The use of separate juries is merely a partial form of severance and is to be evaluated on the factors applicable to motions for separate trials. *Hana*, *supra*, 447 Mich at 331. The court should determine whether the dual-trial procedure provides defendants with the same protections they would have enjoyed through separate trials. *Hana, supra*, 447 Mich at 351–352; *People v Brooks*, 92 Mich App 393, 396–397 (1979).

C. Standard of Review

A trial court's ruling on a motion to sever is reviewed for an abuse of discretion. *Hana*, *supra*, 447 Mich at 331. A trial court's decision regarding joinder is reviewed for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208 (1997).

4.19 Speedy Trial

US Const, Am VI

Const 1963, art 1, § 20

MCR 6.004 Speedy trial

MCL 768.1 Speedy trial; right of parties, duty of public officers

MCL 780.131 Untried warrants, indictments, informations, or complaints against correctional facility inmates

MCL 780.601 Interstate agreement on detainers

A. Right to a Speedy Trial

*See Section 4.2 on delay in arrest.

The right to a speedy trial* is guaranteed to criminal defendants by the Federal and Michigan Constitutions, as well as by statute. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1. MCR 6.004(A) provides that the defendant and the people are entitled to a speedy trial and to a speedy resolution of all matters before the court. To preserve the issue of speedy trial for appeal, a defendant must make a formal demand for a speedy trial on the record. *People v Cain*, 238 Mich App 95, 111 (1999).

In deciding whether a defendant has been accorded a speedy trial, the Michigan Supreme Court has adopted the general rule established by the United States Supreme Court in *Barker v Wingo*, 407 US 514 (1972). *Cain, supra*, 238 Mich App at 112; *People v Collins*, 388 Mich 680, 687–688 (1972). The definitive test in this area requires balancing the following four factors on an ad hoc basis: (1) the length of delay; (2) the reasons for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. See also *People v Wickham*, 200 Mich App 106, 109 (1993); *People v Hill*, 402 Mich 272, 283 (1978); *People v Hall*, 391 Mich 175, 183 (1974).

1. Length of the Delay

The length of the delay itself is not determinative of a speedy trial claim. *People v Hammond*, 84 Mich App 60, 67 (1978). A delay of six months is necessary to trigger further investigation when a defendant raises a speedy

trial issue. *People v Daniel*, 207 Mich App 47, 51 (1994). However, where the delay is less than 18 months, the defendant must show prejudice. *Cain, supra*, 238 Mich App at 112. A delay of more than 18 months is presumptively prejudicial to the defendant and shifts the burden to the prosecutor to show that the delay has not prejudiced the defendant. *Id*.

2. Reasons for the Delay

Regarding the second prong, reason for delay, the court balances the conduct of both the prosecution and the defendant. *Collins*, *supra*, 388 Mich at 690. The reasons for the delay are examined by the court, and each period of delay is attributed to either the prosecution or the defendant. *People v Ross,* 145 Mich App 483, 491 (1985).

> "[I]f the defendant has not contributed to the delay, a period of otherwise unexplained inaction in excess of 180 days in the prosecution of a charge pending against an inmate is per se a violation of the statute, unless the people make an affirmative showing of exceptional and unavoidable circumstances which hamper the normally efficient functioning of the trial courts." *People v Forrest*, 72 Mich App 266, 273 (1976).

Unexplained delays are charged to the prosecution. *Ross, supra*, 145 Mich App at 491. Delays inherent in the court system (docket congestion, etc.) are technically attributed to the prosecution but are given a neutral tint and assigned only minimal weight. *People v Gilmore*, 222 Mich App 442, 460 (1997).

3. Assertion of the Right

A defendant's failure to assert his or her right to a speedy trial is the third factor the court must consider in determining if the right to a speedy trial has been violated. While such failure does not automatically constitute a waiver of the right, it is strong evidentiary support for the conclusion that defendant's right was not violated. *People v Ewing*, 101 Mich App 51, 55 (1980); *Collins*, *supra*, 388 Mich at 692–694. In *People v Missouri,* 100 Mich App 310, 322 (1980), the Court had little difficulty concluding that the defendants' assertion of the right two weeks before trial and nearly 30 months after the defendants were indicted was strong evidence that the delay had not caused a serious deprivation of the defendants' rights.

4. Resulting Prejudice

The final inquiry is whether the defendant experienced any prejudice as a result of the delay. There are two types of prejudice a defendant may experience: (1) prejudice to his or her person; and (2) prejudice to his or her defense. Prejudice to the defendant's person generally takes the form of oppressive pretrial incarceration leading to anxiety and concern. Prejudice to the defendant's defense might include the unavailability of

key witnesses. Delay that impairs the defendant's defense is the most serious because a defendant's inability to adequately defend against criminal charges skews the fairness of the entire system. *Collins*, *supra*, 388 Mich at 694.

General allegations of possible prejudice are insufficient. *Gilmore*, *supra*, 222 Mich App at 462.

B. Recognizance Release

MCR 6.004(C) provides potential relief for defendants who have been incarcerated and are awaiting trial. The court rule states:

> "In a felony case in which the defendant has been incarcerated for a period of 6 months or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, or in a misdemeanor case in which the defendant has been incarcerated for a period of 28 days or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, the defendant must be released on personal recognizance."

The following periods of delay are excluded from the computation of the 28-day or 6-month period:

> (1) periods resulting from other proceedings involving the defendant, including competency and criminal responsibility proceedings, pretrial motions, interlocutory appeals, and the trial of other charges;
>
> (2) the period during which the defendant is not competent to stand trial;
>
> (3) the period resulting from an adjournment requested or consented to by the defendant's lawyer;
>
> (4) the period resulting from an adjournment requested by the prosecutor if the prosecutor demonstrates either of the following:
>
> > (a) the unavailability, despite the exercise of due diligence, of material evidence that the prosecutor has reasonable cause to believe will be available at a later date, or
> >
> > (b) exceptional circumstances justifying the need for more time to prepare the state's case;
>
> (5) a reasonable period when the defendant's trial is joined with a codefendant as to whom the time for trial has not run, but only if

good cause exists for not granting the defendant a severance so as to enable trial within the time limits applicable; and

(6) with the exception of delays caused by docket congestion, any other periods that in the court's judgment are justified by good cause. MCR 6.004(C)(1)–(6).

C. Untried Charges Against State Prisoners—180-Day Rule

MCR 6.004(D)(1) provides that, except for crimes exempted by MCL 780.131(2),*

*Warrants, indictments, informations or complaints arising from a criminal offense by an inmate committed while an inmate, or a criminal offense by an escaped inmate committed before the inmate was returned to custody.

"the prosecutor must make a good faith effort to bring a criminal charge to trial within 180 days of either of the following:

"(a) the time from which the prosecutor knows that the person charged with the offense is incarcerated in a state prison or is detained in a local facility awaiting incarceration in a state prison, or

"(b) the time from which the Department of Corrections knows or has reason to know that a criminal charge is pending against a defendant incarcerated in a state prison or detained in a local facility awaiting incarceration in a state prison." MCR 6.004(D)(1)(a)–(b).

A person is "charged with an offense" for purposes of the rule when a warrant, complaint, or indictment has issued against that person. MCR 6.004(D) describes the following remedies for violations of the 180-day rule:

"(2) Remedy. In cases covered by subrule (1)(a), the defendant is entitled to have the charge dismissed with prejudice if the prosecutor fails to make a good-faith effort to bring the charge to trial within the 180-day period. When, in cases covered by subrule (1)(b), the prosecutor's failure to bring the charge to trial is attributable to lack of notice from the Department of Corrections, the defendant is entitled to sentence credit for the period of delay. Whenever the defendant's constitutional right to a speedy trial is violated, the defendant is entitled to dismissal of the charge with prejudice." MCR 6.004(D)(2).

The 180-day period begins running when the first charging document—ordinarily, the complaint—is issued. *People v Roscoe*, 162 Mich App 710, 716 (1986). According to the Michigan Supreme Court, the 180-day period begins to run

"with the coincidence of either conditions 1 or 2 and condition 3:

> 1) The issuance of a warrant, indictment or complaint against a person incarcerated in a state prison or under detention in any local facility awaiting incarceration in any state prison;
>
> 2) The incarceration of a defendant in a state prison or the detention of such defendant in a local facility to await such incarceration when there is an untried warrant, indictment, information or complaint pending against such defendant; and
>
> 3) The prosecution knows or should know that the defendant is so incarcerated when the warrant, indictment, information or complaint is issued or the Department of Corrections knows or should know that a warrant, indictment, or complaint is pending against one sentenced to their custody." *People v Hill*, 402 Mich 272, 280–281 (1978).

Where a prison inmate was charged with a crime, the penalty for which was a mandatory consecutive prison sentence or lifetime probation, the 180-day rule does not apply. *People v Falk*, 244 Mich App 718, 721–722 (2001). A community corrections center is a state correctional facility for purposes of MCL 780.131(2)(a); therefore, the 180-day rule does not apply. *People v McCullum*, 201 Mich App 463, 465–466 (1993).

The 180-day rule does not apply to an incarcerated parolee until parole is revoked. It is not until parole is revoked that the parolee becomes an accused "being detained in a local facility to await incarceration in a state prison" to whom the 180-day rule applies. *People v Chavies*, 234 Mich App 274, 279–280 (1999).

The statute does not require that the trial be concluded, or even commenced, within the 180 days. The good-faith test requires only that the prosecution demonstrate progress toward bringing the case against a defendant to trial, and if delays arise, the prosecution must demonstrate a continuing good-faith effort to ready the case for trial. *People v Hendershot*, 357 Mich 300, 303–304 (1959); *People v Wilder*, 51 Mich App 281, 284 (1974). Once the prosecution has made an initial good-faith effort to begin the proceedings, dismissal would result only from an inexcusable delay that constitutes the prosecution's lack of intent to promptly bring the matter to trial. *People v Moore*, 96 Mich App 754, 758 (1980). Where a defendant's preliminary examination begins within the 180- day period and there is no showing of lack of good faith on the part of the prosecution in proceeding promptly towards trial, dismissal is not required. *People v Finley*, 177 Mich App 215, 219–220 (1989).

The 180-day period is tolled during the time attributable to a defendant's appeal of the trial court's resolution of any pretrial motions. *People v Smielewski*, 235 Mich App 196, 200 (1999).

D. Detainers

A detainer, under the Interstate Agreement on Detainers Act (IAD), MCL 780.601, *et seq.*, is generally defined as a written notification by a state filed with the institution where a prisoner is serving a sentence, advising the custodial state that the prisoner is wanted for pending charges in the notifying state. *People v Shue*, 145 Mich App 64, 70 (1985). The IAD applies only to prisoners serving a prison sentence; it does not apply to a person in custody awaiting extradition. *People v Monasterski*, 105 Mich App 645, 653 (1981).

"But for good cause shown in open court," Article IV of the IAD requires that trial begin against a prisoner within 120 days of the prisoner's arrival in the receiving state. *People v Harris,* 148 Mich App 506, 513 (1986). The phrase "but for good cause shown" applies only to adjournments and other delays caused by the prosecution; a trial court should not include adjournments requested by the defendant or other delays caused by the defendant in calculating the actual delay attributable to the prosecution. *Harris*, *supra*, 148 Mich App at 513.

MCR 1.108 provides the method for computing the time. *People v Sinclair*, 247 Mich App 685, 687–688 (2001).

E. Standard of Review

The trial court's finding with regard to an alleged violation of the defendant's right to a speedy trial is reviewed for an abuse of discretion. *People v Krum*, 374 Mich 356, 363 (1965).

4.20 Adjournment or Continuance

MCR 2.503 Adjournments

MCR 6.001(D) Applicability of civil rules

MCL 768.2 Criminal cases; precedence, adjournment, continuance

A. Generally

MCL 768.2 provides that the trial court, in a criminal case, has discretion to adjourn or continue a criminal case for good cause shown in the manner provided for civil cases. The statute provides that where the prosecutor and the defendant consent to an adjournment, there shall be a showing to the court that the consent is "founded upon strict necessity and that the trial of said cause cannot be then had without a manifest injustice being done."

B. Factors

If the defendant is requesting an adjournment, the factors to be considered are set forth in *People v Williams*, 386 Mich 565, 575–578 (1972). See also *People v Lawton*, 196 Mich App 341, 348 (1992); *People v Suchy,* 143 Mich App 136, 142 (1985). In *Lawton*, *supra* at 348 and *Williams*, *supra* at 578, the factors identified by the Court included:

- whether the defendant is asserting a constitutional right (in *Williams*, the right to counsel);
- whether the defendant has a legitimate reason for asserting the right (in *Williams*, "an irreconcilable *bona fide* dispute with his attorney over whether to call his alibi witnesses");
- whether the defendant had been negligent with regard to any delay in his or her request;
- whether the defendant had requested previous adjournments; and
- whether the defendant can demonstrate that prejudice would result from a denial of the request.

Adjournments should have been granted in the following situations:

- When defense counsel was permitted to withdraw. *Williams*, *supra,* 386 Mich at 565.
- Preparation of defense expert witness endorsed on the day of trial. *People v Wilson*, 397 Mich 76, 81–82 (1976).
- New witness listed by prosecutor or codefendant turns state's evidence shortly before trial. See *People v Suchy*, 143 Mich App 136, 139–143 (1985).
- New statements made by witnesses shortly before trial. *Id*.
- Defendant requested properly fitted clothes to replace ill-fitting clothes brought for trial. *People v Turner*, 144 Mich App 107, 110–111 (1985). In *Turner*, the defendant had civilian clothing he intended to wear at trial but because he had gained weight in jail, the clothes no longer fit him. The defendant made his request for properly sized clothing at a preliminary motion held before the jury was impanelled. In holding that the trial court should have granted the defendant's request for adjournment, the Court distinguished the case from other cases where a defendant's request was untimely or where the jury had already seen the defendant in jail attire.

A trial court's desire to expedite the court's docket is not a sufficient reason to deny an otherwise proper request for a continuance. *Williams, supra*, 386 Mich at 577.

C. Standard of Review

A trial court's grant or denial of a party's request for a continuance is reviewed for an abuse of discretion. *People v Jackson*, 467 Mich 272, 276 (2002).

Even if the trial court abused its discretion in denying a defendant's request for a continuance, the defendant still must establish that he or she was prejudiced by the court's decision. *Williams, supra,* 386 Mich at 574.

4.21 Search and Seizure Issues

US Const, Am IV

Const 1963, art 1, § 2

A. Generally

The federal and state constitutions prohibit unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 2. *People v Kazmierczak*, 461 Mich 411, 417 (2000). The reasonableness of a search or seizure is determined by balancing the governmental interest that justifies the intrusion against an individual's right to be free of arbitrary police interference. *Terry v Ohio*, 392 US 1, 20–21 (1968).

The protections provided in the United States and Michigan constitutions apply to three categories of encounters between the police and citizens:

- Arrests, for which the Fourth Amendment requires that the police have probable cause to believe that a person has committed or is committing a crime;
- Investigatory stops (or "*Terry* stops"), which are limited to brief, non-intrusive detentions. In order to justify an investigatory stop the police must have specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or is committing a crime; and
- Situations in which there is no restraint upon the citizen's liberty and the officer is seeking the citizen's voluntary cooperation through non-coercive questioning. *People v Bloxson*, 205 Mich App 236, 241 (1994); *United States v Johnson*, 910 F2d 1506, 1508 (CA 7, 1990).

When addressing a challenged search or seizure, several preliminary questions may be appropriate:

- Was there a search or seizure?
- Does the defendant have standing to challenge the search?
- Where did the search take place?
- Was a warrant required?
- Was there probable cause?
- Is exclusion the remedy if a violation is found?

A detailed discussion of each of these questions follows.

B. Was There a Search or Seizure?

♦ A "search" within the context of the Fourth Amendment involves

> "some exploratory investigation, or an invasion and quest, a looking for or seeking out. The quest may be secret, intrusive, or accomplished by force, and it has been held that a search implies some sort of force, either actual or constructive, much or little. A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. While it has been said that ordinary searching is a function of sight, it is generally held that the mere looking at that which is open to view is not a search." See *Brown v State*, 372 P.2d 785 (Alaska 1962) quoting C.J.S. Searches and Seizures §1 (1952).

♦ A "seizure" of property within the context of the Fourth Amendment occurs when there is some meaningful interference with an individual's possessory interests in that property. *United States v Jacobsen*, 466 US 109, 113 (1984).

No search occurs unless it is shown "first that a person has exhibited an actual (subjective) expectation of privacy, and second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz v United States*, 389 US 347, 361 (1967). See also *Kyllo v United States*, 533 US 27, 34 (2001) (scanning with a thermal imaging device was a search since it was similar to a physical intrusion).

The following instances are not searches:

- When the object is in the officer's plain view, smell, hearing, or touch. When an officer is able to detect something by utilization of

one or more of his or her senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a "search" within the meaning of the Fourth Amendment. *Coolidge v New Hampshire*, 403 US 443, 468 (1971).

- The use of a flashlight or other form of illumination used to see an area that is obscured by darkness is not a search. *United States v Lee*, 274 US 559, 563 (1927).

- The use of binoculars, telescopes or photo enlargements so long as they are used to observe more clearly or carefully that which was in the open or in order to view at a distance that which could have lawfully been observed from a closer proximity. *United States v Lace*, 669 F2d 46, 51 (CA 2, 1982).

- Messages sent over telephone wires are not protected by the Fourth Amendment. *Olmstead v United States*, 277 US 438, 466 (1928). However, note that Title III of the Crime Control Act of 1968 prohibits wiretapping except under very limited circumstances.

- The use of trained dogs to detect the presence of explosives or narcotics. *United States v Place*, 462 US 696, 697–698 (1983).

C. Does the Defendant Have Standing?

There is no "automatic standing." Fourth Amendment rights are personal in nature and may only be asserted by one whose own constitutional rights were violated by the search and seizure. A defendant must demonstrate that he or she personally has an expectation of privacy in the place searched, and that this expectation is reasonable. *Rakas v Illinois*, 439 US 128, 143–144 (1978). The defendant has the burden of establishing standing, *People v Lombardo*, 216 Mich App 500, 505 (1996), and in deciding the issue, the court should consider the totality of the circumstances. *People v Smith*, 420 Mich 1, 28 (1984); *People v Perlos,* 436 Mich 305, 317 (1990). The "reasonable expectation of privacy test" applies to issues of warrantless searches and seizures. *Smith, supra*, 420 Mich at 28.

A person can abandon property and entirely deprive himself of the ability to contest a search and seizure of that property. *People v Zahn*, 234 Mich App 438, 448 (1999). The search and seizure of property that has been abandoned is "presumptively reasonable," because the owner no longer has an expectation of privacy in the abandoned property. *People v Rasmussen*, 191 Mich App 721, 725 (1991). The defendant bears the burden of showing that the property searched was not abandoned. *Id*. Whether an owner abandoned his property is an ultimate fact that turns on a combination of act and intent. *People v Shabaz*, 424 Mich 42, 65–66 (1985). With respect to abandoned or vacant structures, several factors

must be evaluated on a case-by-case basis to determine whether police officers may enter a dwelling without securing a warrant:

> "(1) the outward appearance, (2) the overall condition, (3) the state of the vegetation on the premises, (4) barriers erected and securely fastened in all openings, (5) indications that the home is not being independently serviced with gas or electricity, (6) the lack of appliances, furniture, or other furnishings typically found in a dwelling house, (7) the length of time that it takes for temporary barriers to be replaced with functional doors and windows, (8) the history surrounding the premises and prior use, and (9) complaints of illicit activity occurring in the structure." *People v Taylor*, 253 Mich App 399, 407 (2002).

The *Taylor* Court further advised that the listed factors were "not exhaustive or otherwise dispositive[; rather], a trial court must necessarily place them into the totality of the circumstances equation where a vacant structure is at issue." *Id*.

D. Where Did the Search Take Place?

The rules pertaining to search and seizure vary depending upon the location of the search. Courts have justified the different levels of protection by examining the expectation of privacy a person might have in a particular location or object and balancing the level of intrusiveness of the search and any overriding societal interests.

1. The Search of a Dwelling

*Section 4.23 contains more information on dwelling searches.

A person's privacy expectation in his or her own dwelling is such that warrantless searches are allowed only in limited—or exigent—circumstances.* The warrantless entry of a dwelling may be justified by "hot pursuit of a fleeing felon, to prevent the imminent destruction of evidence, to preclude a suspect's escape, and where there is a risk of danger to police or others inside or outside a dwelling." *People v Cartwright*, 454 Mich 550, 558 (1997). See also *Minnesota v Olson*, 495 US 91, 100 (1990).

2. The Search of an Automobile

*See also the separate section on automobile searches in Section 4.22.

Warrantless searches of automobiles are permissible upon a showing of probable cause.* Courts have justified the automobile exception to the warrant requirement in two ways. Some courts have found that a defendant has a lower expectation of privacy with regard to an automobile than he or she has in a dwelling. See *Chambers v Maroney*, 399 US 42, 48 (1970). Other courts have used the justification that the mobility of an automobile requires that the police have the flexibility to search the

vehicle without a warrant. See *Carroll v United States*, 267 US 132, 153 (1925).

3. Search or Seizure of Containers or Personal Effects

Rules regarding the search or seizure of containers or personal effects apply both to those items that are in the possession of the suspect and those that are not.

California v Acevedo, 500 US 565, 580 (1991), "interpret[ed] *Carroll* as providing one rule to govern all automobile searches. The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained."

There are six possible bases for a warrantless search of containers and other personal effects:

- Search of the object incident to the arrest of its possessor on the ground that it is within his or her "immediate control." *Chimel v California,* 395 US 752, 762–763 (1969).

- Inventory of the object subsequent to the arrest of its possessor so long as the inventory search is conducted according to established policy. *Colorado v Bertine*, 479 US 367, 374 (1987). See also *People v Toohey*, 438 Mich 265, 266 (1991).

- The search of a container or personal effects of a suspect without a warrant is permissible if the police have probable cause to believe that the container or effects contain evidence of crime and it would have been impracticable to obtain a search warrant first because of certain exigent circumstances. See *United States v Chadwick*, 433 US 1, 13–15 (1977). Examples of exigent circumstances include incidences where the object contained evidence which would lose its value unless obtained at once, where an immediate search would facilitate the apprehension of confederates or the termination of continuing criminal activity. *Id*.

- Reasonable search of the object for reasons unrelated to the obtaining of evidence of a crime. See *United States v Dunavan*, 485 F2d 201, 204–205 (CA 6, 1973). Where the search was not a pretext but rather was done as a matter of the police performing their general duties owed to the public.

- Search following a "controlled delivery" of the object by police or a police agent or suspect. Where the police know that an object containing contraband has been delivered to a suspect, they may search the object upon its receipt by the suspect. See *United States v DeBerry,* 487 F2d 448, 450–451 (CA 2, 1973).

4. Search That Takes Place in a School

Searches that take place in schools may be properly conducted based on a level of suspicion less than probable cause. Courts have justified searches of students based on reasonable suspicion. The child's interest in privacy is balanced against the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. *New Jersey v T.L.O.*, 469 US 325, 341–343 (1985).

5. Searches That Take Place in an Airport

Everyone entering the secured areas of airports can be searched without a showing of probable cause. These searches are justified because they are conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime. See *United States v Davis*, 482 F2d 893, 908–911 (CA 9, 1973).

6. Searches That Take Place at Border Crossings

Border searches are considered reasonable based on the single fact that the person or item is entering the country from the outside. *United States v Ramsey*, 431 US 606, 620 (1977).

7. Searches of Parolees or Probationers

The search of a parolee or probationer may be justified on a showing of less than probable cause. The justification for this has often been that the state's interest in administering the criminal justice system requires that the state have greater flexibility in monitoring the activities of those persons on parole or probation. *Griffin v Wisconsin*, 483 US 868, 873–875 (1987). See also *United States v Knights*, 534 US 112, 122 (2001) (permitting a search based on a probation condition and reasonable suspicion).

8. Searches That Take Place in Prison

In *Hudson v Palmer*, 468 US 517, 525–526 (1984), the Supreme Court held that Fourth Amendment protections do not apply to a prison cell. The correctional facility's interest in security outweighs a prisoner's already lowered expectation of privacy. *People v Herndon*, 246 Mich App 371, 397 (2001).

9. The Use of Roadblocks

The use of roadblocks to enforce regulations concerning the use of vehicles, including the use of checkpoints to check driver's licenses and vehicle registrations, to make safety inspections of vehicles, to check sobriety, or to inspect cargo trucks or similar containers are permissible. *Michigan Dep't of State Police v Sitz*, 496 US 444 (1990). But see *Sitz v Dep't of State Police*, 443 Mich 744, 746 (1993), where the Michigan

Supreme Court ruled that the state constitution provides greater protection against warrantless seizures than does the federal constitution and the use of checkpoints violated Const 1963, art 1, § 11.

The use of roadblocks following the commission of a crime is permissible so long as the purpose of the stop was to arrest suspects for a known crime, not to discover evidence of undetected crimes by the happenstance of visual searches. See *United States v Harper*, 617 F2d 35, 40–41 (CA 4, 1980).

Roadblocks aimed at finding drugs rather than impaired drivers are not permissible under the Fourth Amendment. *City of Indianapolis v Edmond*, 531 US 32, 46–47 (2000).

The constitutionality or reasonableness of a checkpoint scheme must be judged on the basis of the specific circumstances. This requires the court to balance "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Illinois v Lidster*, 540 US 419 (2004), quoting *Brown v Texas*, 443 US 47, 51 (1979). The seizures in *Lidster* were constitutional because the public concern at issue was of grave importance (seeking witnesses to a fatal hit-and-run accident), the checkpoint significantly furthered the public concern and was tailored to fit specific investigatory needs (checkpoint on the same highway, near the location of the accident, at the same time of night), and the stops caused only minimal interference with drivers' liberty (a brief wait in line taking a matter of minutes at most). *Lidster, supra*, 540 US 419.

E. Was a Warrant Required?

There is a strong preference for the making of searches and seizures pursuant to a search warrant. See *United States v Ventresca*, 380 US 102, 106 (1965); *People v Goforth*, 222 Mich App 306, 309 (1997). However, warrantless searches are permitted under specific circumstances. Exceptions to the warrant requirement include:

1. "Exigent Circumstances," "Emergency Doctrine," or "Hot Pursuit"

The exigent circumstances exception is a recognized exception to the Fourth Amendment warrant requirement. See *People v Cartwright*, 454 Mich 550, 558–559 (1997); *People v Davis*, 442 Mich 1, 10 (1993); *People v Snider*, 239 Mich App 393, 406–407 (2000).

Pursuant to the exigent circumstances exception a police officer may enter a dwelling without a warrant if the officer possesses probable cause to believe that a crime was recently committed on the premises or that the premises contains evidence or perpetrators of a suspected crime. The police must further establish the existence of an actual emergency—the

exigent circumstances—on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect. *In re Forfeiture of $176,598*, 443 Mich 261, 271 (1993); *People v Blasius*, 435 Mich 573, 593–594 (1990).

To justify the warrantless entry of a residence, the officer must articulate specific and objective facts which reveal an actual emergency amounting to more than a mere possibility of an immediate risk of the destruction or removal of evidence. *Blasius*, *supra*, 435 Mich at 574.

A police officer may enter a dwelling without a warrant where it is reasonably believed that a person inside is in need of medical assistance; the entry must be limited to the reason for its justification, and the officer must be motivated primarily by a perceived need to render assistance and may do no more than is reasonably necessary to determine whether assistance is required and render it. *Davis*, *supra*, 442 Mich at 2; *People v Ohlinger*, 438 Mich 477, 483–484 (1991).

Where a police officer was dispatched to a domestic violence incident possibly involving weapons, a warrantless entry and search of the premises was permissible under both the exigent circumstances and emergency aid exceptions. *People v Beuschlein*, 245 Mich App 744, 757–758 (2001).

2. Search Incident to Arrest

*See also Section 4.22 on automobile searches.

Once there is a custodial arrest a full search of the person requires no additional justification.* *United States v Robinson*, 414 US 218, 235 (1973).

3. Inventory Search

After a custodial arrest the police may search any property belonging to the suspect that is impounded at the time of arrest. Such a search is commonly referred to as an Inventory Search.

The decision to impound a car must be based upon an established set of departmental procedures followed by all officers. *People v Toohey*, 438 Mich 265, 266 (1991). An impoundment and subsequent inventory search is undertaken as part of the caretaking functions performed by the police. *Id*. Impoundment must not be used as a pretext for conducting a criminal investigation. *Id*.

In order for a vehicle inventory search to be valid it must be shown that it was conducted in accordance with reasonable procedures established to safeguard impounded vehicles and their contents. *People v Long*, 419 Mich 636, 648 (1984). Where no such procedures are present or where a police officer acts in a manner contrary to established procedures the inventory search is unlawful. *Id*.

Police officers may open closed containers pursuant to an inventory search only if established departmental policies authorize such an action. See *Colorado v Bertine*, 479 US 367 (1987) and *Florida v Wells*, 495 US 1, 4–5 (1990).

4. Investigatory Stop ("*Terry* Stop")*

*See also Section 4.24.

When a police officer observes unusual conduct that causes him or her to reach the reasonable conclusion, in light of the officer's experience, that criminal activity may be afoot and that the persons with whom the officer is dealing may be armed and dangerous, the officer may identify himself or herself as a police officer and make reasonable inquiries into the conduct to confirm or dispel the officer's suspicions. If the officer is unable to dispel a reasonable fear for his or her safety, the officer is entitled for the protection of himself or herself and others in the area to conduct a carefully limited pat-down search of the outer clothing of such persons in an attempt to discover weapons. A search under these circumstances is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken. *Terry v Ohio*, 392 US 1 (1968).

A police officer does not need probable cause or an articulable suspicion to conduct a computer check of a vehicle's license plate number. *People v Jones*, 260 Mich App 424, 427–429 (2004). An investigatory stop is justified if a computer check reveals that the vehicle's registered owner is subject to arrest and no visible evidence contradicts the inference that the vehicle's driver is also the registered owner. *Jones, supra*, 260 Mich App at 438. As long as the investigatory stop was proper and the subsequent arrest was warranted, the search of the driver's person and vehicle does not violate the Fourth Amendment, and any evidence discovered during the warrantless search was lawfully obtained. *Jones, supra*, 260 Mich App at 430.

A "*Terry* stop" need not be based upon probable cause; rather an officer may "stop and frisk" a defendant based upon a reasonable suspicion supported by articulable facts that criminal activity might be afoot. *Terry, supra*, 392 US at 30; *United States v Sokolow*, 490 US 1, 7 (1989).

5. Consent

There is no need for a search warrant where the defendant consents to the search. What amounts to consent differs in relation to the person granting it.

Consent by defendant:

When a defendant voluntarily consents to a warrantless search or seizure, there is no Fourth Amendment violation. *People v Chism*, 390 Mich 104, 123 (1973); *People v Lobaito*, 133 Mich App 547, 553 (1984). To justify a warrantless search or seizure on the basis of consent, the prosecution

must show by clear and positive evidence that the defendant consented to the search and seizure. *People v Kaigler*, 368 Mich 281, 294–295 (1962). According to the *Kaigler* Court:

> "Consent must be proved by clear and positive testimony and be shown to have been made without duress, coercion, actual or implied. The prosecution must show consent is unequivocal, specific, freely and intelligently given." *Id*. at 294.

Whether consent was in fact voluntary in a particular case or was given in submission to an express or implied assertion of authority is a question of fact to be determined in light of all the circumstances. *Schneckloth v Bustamonte*, 412 US 218, 227 (1973); *People v Whisnant*, 103 Mich App 772, 776–777 (1981).

Consent given by a suspect who is not in custody may be valid even if given after a request to speak to an attorney. *People v Marsack*, 231 Mich App 364, 376 (1998).

The Fourth Amendment does not require police to inform detainees they are free to go before a consent to search may be deemed voluntary. *Ohio v Robinette*, 519 US 33, 35 (1996)

Another exception to the Fourth Amendment warrant requirement is where an individual has agreed to submit to warrantless searches as a condition of probation. Under those circumstances the police need only reasonable suspicion of a possible criminal act to search the probationer's property. *United States v Knights*, 534 US 112, 118–121 (2001). See also *Griffin v Wisconsin*, 483 US 868, 872–873 (1987) (authorizing probation officers to search probationers when they are suspected of criminal activity).

Consent by third person:

> "[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v Matlock*, 415 US 164, 171 (1974).

A person who had equal possession or control of the premises searched may also consent to the search. See *Illinois v Rodriguez*, 497 US 177, 181 (1990) (which addresses "apparent authority"); *People v Davis*, 146 Mich App 537, 544–546 (1985); *People v Gary*, 150 Mich App 446, 450–453 (1986).

Consent obtained by reference to search warrant:

There is no consent if police state or suggest that they have a search warrant if they do not have a warrant.

> "In *Bumper v North Carolina,* [391 US 543 (1968)], the United States Supreme Court made clear that where a person 'permits' a search in the face of an assertion by the police that they have a warrant, there is no consent that can support the validity of the search.
>
> * * *
>
> [T]he defendant testified that [the police officer] displayed a search warrant form in his folder when he confronted the defendant. The defendant also testified that he believed the officers had a warrant and allowed them to enter for that reason. The circuit judge ultimately found that testimony believable, relying particularly on the specificity of the defendant's testimony by contrast to that of the officers. Such factual determinations by trial judges are to be sustained unless clearly erroneous [internal citations omitted]." *People v Farrow*, 461 Mich 202, 207–208 (1999).

6. Inspections, Border Searches and Regulatory Searches

Inspections, border searches and regulatory searches need not be accompanied by a warrant so long as the need to search outweighs the invasion which the search entails. The inspection or regulatory search must be based upon reasonable standards. See *Camara v Municipal Court*, 387 US 523, 534–539 (1967); *United States v Brignoni-Ponce*, 422 US 873, 878–883 (1975).

7. Objects in Plain View

To prevent generalized searches, the law prohibits police officers from seizing items not listed in a search warrant unless an exception to the warrant requirement exists. One such exception is the "plain view" doctrine. In *Minnesota v Dickerson*, 508 US 366 (1993), the United States Supreme Court defined that doctrine as follows:

> "[I]f police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officer has a lawful right of access to the object, they may seize it without a warrant. If, however, the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object — i.e., if 'its incriminating character [is not] immediately apparent,' the plain-view doctrine

> cannot justify its seizure [internal citations omitted]." *Id.* at 375.

See also *Horton v California*, 496 US 128, 133–137 (1990); *Coolidge v New Hampshire*, 403 US 443, 465–471 (1971).

In *Arizona v Hicks*, 480 US 321, 325–329 (1987), the Court addressed a situation where the plain-view doctrine did not justify an object's seizure. Specifically, the Court held invalid officers' seizure of stolen stereo equipment while executing a search warrant of other evidence. Although police were lawfully on the premises, they obtained probable cause to believe that the stereo equipment was contraband only after moving the equipment in order to read its serial numbers. The Court reasoned that the subsequent seizure of the equipment could not be justified by the plain view doctrine because the incriminating character of the stereo equipment was not immediately apparent. Rather, officers had to engage in further investigation to determine if possession of the equipment was unlawful.

See also *People v Galloway*, 259 Mich App 634, 639–642 (2003) (marijuana plants growing in a shed behind the defendant's house were inadmissible at trial because although the plants were in plain view from the officer's vantage point in the defendant's backyard, the officer's entry into the backyard was unlawful); *People v Fletcher*, 260 Mich App 531, 550–551 (2004) (documents not listed in a search warrant were properly seized because their incriminating nature was immediately apparent to the officer—in a homicide investigation, the documents provided evidence of the defendant's illicit affair with a woman not the defendant's wife).

The Michigan Supreme Court has similarly defined the plain-view doctrine. In *People v Secrest*, 413 Mich 521 (1982), police officers executing a search warrant for weapons in defendant's apartment seized photographs of the defendant which were used against him at his trial. In ruling that the plain-view doctrine did not authorize seizure of the photographs, the Court stated:

> "There must be something incriminating about the evidence the police inadvertently come upon; indeed, some courts have added the incriminating nature must be 'immediately apparent'.
>
> "[W]e fear we would come too quickly to what Justice Stewart described as 'the general searches and unrestrained seizures that had been a hated hallmark of colonial rule.' The warrant in this case directed the officers to search for a weapon and for ammunition. Either can be quite small. If the police can, while scouring a house look for these objects, seize as being in plain view items which only later serve to connect the defendant to a crime, then they are effectively operating under a general warrant." *Secrest, supra*, 413 Mich at 528–529.

In *Bond v United States*, 529 US 334, 335 (2000), the Court was protective of the privacy of bags and soft luggage that passengers carry with them on buses and trains, finding that police could not manipulate carry-on luggage placed in an overhead bin.

8. Protective Sweep

When an arrestee is taken into physical custody pursuant to a lawful arrest, it is reasonable for the police to search him for "weapons, instruments of escape, and evidence of crime." *People v Houstina*, 216 Mich App 70, 75 (1996). Further, the police may search the area within the arrestee's immediate reach. *Id*.

The area within the arrestee's immediate control is defined as "the area from which the arrestee might gain possession of a weapon or destructible evidence." *People v Jackson*, 123 Mich App 423, 429 (1983), citing *Chimel v California*, 395 US 752, 763 (1969). However, "the scope of the search must be strictly tied to, and justified by, the circumstances that rendered its initiation permissible." *Houstina*, *supra*, 216 Mich App at 75.

9. "Open Fields"

A search of an open field need not be accompanied by a warrant.

> "[A]n open field is neither a 'house' nor an 'effect,' and, therefore, 'the government's intrusion upon the open fields is not one of those 'unreasonable searches' proscribed by the text of the Fourth Amendment.' . . . '[The] term 'open fields' may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither 'open' nor a 'field' as those terms are used in common speech.'" *United States v Dunn*, 480 US 294, 303–304 (1987), quoting *Oliver v United States*, 466 US 170, 177, 180 n 11, 182–183 (1984).

10. Knock and Talk

Inculpatory evidence obtained after police officers refused a defendant's request that they leave the defendant's home is inadmissible as fruit of the poisonous tree. *People v Bolduc*, 263 Mich App 430, 443–445 (2004). In *Bolduc*, the defendant opened his door to two law enforcement officers and allowed them to enter his home. The defendant denied possessing marijuana, refused to consent to a search of his home, and asked the officers to leave. Instead of leaving, however, one of the officers began questioning the defendant about a bulge in the defendant's pocket. The defendant explained that the bulge was $6,500 from a sale he made earlier that day at the defendant's used car lot. The defendant offered to confirm the source of the money by taking the officers to the car lot to verify the sale. The defendant was unable to prove that the sum of money in his pocket was the result of a sales transaction. The defendant eventually

admitted to possessing marijuana and took the officers back to his house where the defendant turned over nine bags of marijuana to the officers.

Under these circumstances, the Court of Appeals ruled that the police officers exceeded the constitutional limits of a properly conducted "knock and talk" interaction with the defendant and in doing so, created a coercive environment in which the defendant's subsequent cooperation could not be considered voluntary. *Bolduc, supra* at 436–443. Applying the standard test to the facts in *Bolduc,* the Court concluded that under the totality of circumstances—the "knock and talk" encounter occurred inside the defendant's home where no real retreat was possible beyond the verbal and physical indication given by the defendant that he wished the officers to leave—a reasonable person would not have felt free to ignore the police officers' presence and go about his business. *Bolduc, supra* at 441. According to the Court:

> "By failing to leave defendant's home when requested to do so, the police officers suggested that they were in control of the situation and would not accept defendant's exercise of the right to preclude them from further activity at the home.
>
> * * *
>
> "Unlike a street encounter, a person such as defendant does not have the option to test whether he is actually confined by the police conduct that he is faced with by simply walking away. Where was defendant to go to avoid the intrusion of the police upon his own property? At that point, defendant had done everything that was reasonably possible for him to convey the message that the police were no longer welcome in his home." *Bolduc, supra* at 442–443.

Although the inculpatory evidence was obtained after the coercive "knock and talk" incident inside the defendant's home, the coercion tainted any evidence obtained as a result of the officers' initial visit to the defendant's home. The incriminating evidence obtained during the defendant's later "cooperation" with the officers "ensued from the police officers' improper conduct in failing to leave when requested[and was] properly suppressed as the fruit of the illegal seizure . . . ." *Bolduc, supra* at 444. The Court reiterated the constitutional considerations present in such an encounter:

> "In sum, while the police are free to employ the knock and talk procedure, [*People v*]*Frohriep*, [247 Mich App 692 (2001)], they have no right to remain in a home without consent, absent some other particularized legal justification. A person is seized for purposes of the Fourth Amendment when the police fail to promptly leave the

person's house following the person's request that they do so, absent a legal basis for the police to remain independent of the person's consent." *Bolduc, supra* at 444–445.

F. Was There Probable Cause?

Probable cause to arrest and probable cause to search are measured by the same standard of evidence. See e.g., *Spinelli v United States,* 393 US 410, 416–418 (1969), a case involving a search that cites *Draper v United States*, 358 US 307 (1959), a case involving probable cause to arrest, as a "suitable benchmark."

> In making a probable cause determination the court must examine the totality of the circumstances faced by the officer at the time the search was made. *Illinois v Gates*, 462 US 213, 238–239 (1983). An officer has probable cause to arrest a suspect or conduct a search when the facts and circumstances within the officer's personal knowledge, and of which he or she has reasonably trustworthy information, are sufficient in themselves to warrant a person of reasonable caution to believe that a crime has occurred and that the suspect committed it, or that evidence of a crime can be found at a particular location. *Id*. *Gates* is a search warrant case.

G. Is Exclusion the Remedy if a Violation Is Found?

Not all violations of the Fourth Amendment lead to exclusion of the evidence. See *People v Stevens (After Remand)*, 460 Mich 626, 633–642 (1999). Courts have carved out exceptions to the exclusionary rule where the discovery of the evidence was inevitable or there was an independent source for the information. *People v Spencer*, 154 Mich App 6, 17 (1986).

1. Good-Faith Exception

Even though police were not responsible for the issuance of an invalid bench warrant that led to the defendant's arrest, evidence seized during the search incident to arrest cannot be admitted under a federal "good faith" exception to the exclusionary rule. *People v Scherf*, 251 Mich App 410 (2002). Since *Scherf* was decided, Michigan has adopted a "good faith" exception to the exclusionary rule. *People v Goldston*, 470 Mich 523, 526 (2004). First announced by the United States Supreme Court in *United States v Leon*, 468 US 897 (1984), the good-faith exception is a remedy for automatic exclusion of evidence obtained as a result of a law enforcement officer's reasonable good-faith reliance on a search warrant later found to be defective. Said the *Goldston* Court:

> "The purpose of the exclusionary rule is to deter police misconduct. That purpose would not be furthered by excluding evidence that the police recovered in objective,

good-faith reliance on a search warrant." *Goldston, supra*, 470 Mich at 526.

2. Inevitable Discovery Exception

The exclusionary rule does not apply to evidence that would have been inevitably discovered without regard to the violation that actually led to its discovery. *Nix v Williams*, 467 US 431, 444 (1984). Whether the inevitable discovery doctrine applies requires an analysis of three basic questions:

- Are the legal means of discovery truly independent of the unlawful conduct that first led to the evidence's discovery?
- Are both the use of the legal means and the discovery of the evidence at issue by that means truly inevitable?
- Does application of the inevitable discovery exception either provide an incentive for police misconduct or significantly weaken Fourth Amendment protection? *People v Stevens (After Remand),* 460 Mich 626, 638 (1999), citing *United States v Silvestri,* 787 F2d 736, 744 (CA 1, 1986).

The inevitable discovery exception generally permits admission of tainted evidence when the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been revealed in the absence of police misconduct. *People v Stevens (After Remand)*, 460 Mich 626, 637 (1999).

See also *People v Kroll*, 179 Mich App 423, 429–430 (1989), applying the inevitable discovery and independent source exceptions to the exclusionary rule.

3. Independent Source Exception

The exclusionary rule does not apply to evidence discovered as a result of police misconduct when the government learned of the evidence from a source independent of the misconduct. See *Wong Sun v United States*, 371 US 471, 485 (1963).

H. Standard of Review

A trial court's findings of fact on a motion to suppress is reviewed for clear error. "However, questions of law relevant to the suppression issue are reviewed de novo." *People v Sobczak-Obetts*, 463 Mich 687, 694 (2001). The application of the exclusionary rule is a question of law that is reviewed de novo. *People v Custer*, 465 Mich 319, 326 (2001).

4.22 Automobile Searches

US Const, Am IV

Const 1963, art 1, § 2

A. Generally

The search of an automobile on probable cause requires no warrant, whether the search is made immediately at the scene or delayed for some period of time after the vehicle is in police custody.

The opening of containers found within the automobile when it is searched on probable cause requires no warrant, so long as the items for which there is probable cause could be held by the container.

Where the probable cause to search an automobile is specific to a container in that vehicle, the automobile exception still applies and the container may be searched. However, the remainder of the automobile may not be searched, and it is unlikely that discovery of the item sought, or the failure to discover it in the target container, will justify any further search.

The Supreme Court has established a "bright line rule" allowing the search of the passenger compartment of an automobile incident to the arrest of an occupant. The search is permissible even though those in the vehicle are removed from the vehicle and have no access to the interior during the search.

Open or closed containers may be searched incident to the arrest. It is unlikely that locked containers may be broken into.

After making a traffic stop, police may order a driver and passenger out of a car to preserve safety, but a "full field-type search" is not usually justified. Officers who have reason to believe motorists have weapons may perform a patdown. *Knowles v Iowa*, 525 US 113, 117–118 (1998).

B. Standing

> "Under the Fourth Amendment, a search occurs when an individual has a reasonable expectation of privacy. Thus, before a person may attack the propriety of a search and seizure of property and receive the panoply of Fourth Amendment safeguards, that search or seizure must have infringed upon an interest of the person which the Fourth Amendment was designed to protect. This initial inquiry regarding standing depends upon whether, in light of the totality of the circumstances, the defendant had an expectation of privacy in the object of the search and seizure, and whether that expectation is one that society is prepared to recognize as reasonable.

* * *

> Fourth Amendment rights are personal in nature and may not be asserted vicariously, but rather only 'at the instance of one whose own protection was infringed by the search and seizure [citations omitted].'" *People v Armendarez*, 188 Mich App 61, 70–71 (1991).

The police can search a passenger's personal belongings inside the automobile that they have probable cause to believe contain contraband. *Wyoming v Houghton*, 526 US 295, 302 (1999).

C. Probable Cause to Search an Automobile

The "automobile exception" to the warrant clause is a true warrant exception. The search is one which is based on probable cause and directed at the seizure of evidence. The warrant is excused because of the exigency of the mobility of vehicles, *Carroll v United States*, 267 US 132, 153 (1925), and the reduced privacy expectations in vehicles when compared to fixed structures. *Chambers v Maroney*, 399 US 42, 48–50 (1970).

Under the automobile exception to the warrant requirement, police may search a vehicle without a warrant if there is probable cause to believe that the vehicle contains evidence of a crime. *United States v Ross*, 456 US 798, 799 (1982). Furthermore, such probable cause may come from a confidential informant's tip, when the tip is sufficiently detailed and is corroborated by law enforcement personnel. *Chambers, supra*, 399 US at 44, 52.

Reasonableness is the test that is to be applied for both stopping and searching moving motor vehicles. *People v Whalen*, 390 Mich 672, 682 (1973). In determining reasonableness, the court looks at the totality of the circumstances. *People v Oliver*, 464 Mich 184, 192 (2001).

The smell of marijuana alone by a person qualified to recognize the odor may establish probable cause to search a motor vehicle, pursuant to the motor vehicle exception to the warrant requirement. *People v Kazmierczak*, 461 Mich 411, 426–427 (2000).

In *People v Davis*, 133 Mich App 707, 716–717 (1984), the Court of Appeals stated that probable cause to search the vehicle alone is enough to satisfy the protection guaranteed by the Fourth Amendment, and there is no need to assess in each individual case whether exigent circumstances were present. See also *People v Garvin*, 235 Mich App 90, 101–102 (1999).

Even though a fire rendered a defendant's vehicle inoperable, the vehicle could still be searched without a warrant under the automobile exception, and evidence of arson found as a result of the search should have been admitted. *People v Carter*, 250 Mich App 510, 514–517 (2002). The Court of Appeals stated that the application of the vehicle exception to the warrant requirement

does not depend on whether the particular vehicle can be driven away. The exception was established because of the mobility of automobiles in general.

D. Searching a Container Located in an Automobile

The general rule is that "[t]he police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." *California v Acevedo*, 500 US 565, 580 (1991).

In *People v Bullock*, 440 Mich 15 (1991), the police had probable cause to believe that narcotics were in luggage that had been placed in an automobile. The Michigan Supreme Court acknowledged that *Acevedo, supra,* allows the police to

> "open and search any container placed or found in an automobile, as long as they have the requisite probable cause with regard to such a container, even if such probable cause focuses specifically on the container and arises before the container is placed in the automobile." *Bullock*, *supra* at 21–26.

In *Ross, supra*, 456 US 798, police had probable cause to search an entire car for contraband. During the search, officers discovered a closed paper bag in the trunk, which they opened without a warrant. The Court ruled that the search of the paper bag in the trunk was constitutional. The Court stated that if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. Although a warrant is not required for the search of a car because of its mobility, the scope of the search should include all areas in the car that a magistrate, if it had been practicable to request a warrant, could have authorized. *Ross, supra*, 456 US at 823.

Thus, all containers large enough to hold the object of the search may be opened without a warrant during an automobile search. And, if the container may be searched at the scene, it may also be seized and searched without a warrant shortly thereafter, at the police station. *United States v Johns*, 469 US 478, 485 (1985).

E. Searching an Automobile Incident to Arrest

The Supreme Court established a "bright line" rule regarding the search of an automobile incident to an arrest. In *New York v Belton*, 453 US 454, 460 (1981), the Court stated that when a police officer has made a lawful custodial arrest of the occupant of an automobile, the officer may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. The officer may also examine the contents of any container found within the passenger compartment whether it is open or closed because the lawful custodial arrest justifies the infringement of any privacy interest. Michigan followed this rule in the following cases: *People v Eaton*, 241 Mich

App 459, 463–465 (2000); *People v Yeoman*, 218 Mich App 406, 412 (1996); *People v Catanzarite*, 211 Mich App 573, 581 (1995); *People v Alfafara,* 140 Mich App 551, 561 (1985); *People v Waddell*, 132 Mich App 171 (1984); *People v Miller*, 128 Mich App 298, 305 (1983).

A police officer may lawfully search an individual's vehicle incident to that individual's arrest, even when the officer's first contact with the arrestee occurs after the individual has gotten out of the vehicle. *Thornton v United States*, 541 US ___ (2004). *Thornton* formally extends *Belton, supra*, 453 US 454, to "recent occupants" of a vehicle and expressly authorizes searches incident to arrest without regard to whether the arrestee was first contacted inside or outside the vehicle.

4.23 Dwelling Searches

US Const, Am IV

Const 1963, art 1, § 11

A. Generally

The federal and state constitutions protect "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures" and further requires that any search warrant issued be based "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." US Const, Am IV; Const 1963, art 1, § 11.

An individual's expectation of privacy from search and seizure extends to the curtilage, or the area immediately surrounding, the dwelling. *United States v Dunn*, 480 US 294, 300 (1987). In evaluating whether an area is included in the curtilage of the dwelling, the court should examine four factors:

> "the proximity of area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Id*. at 301.

B. Standing

Defendants may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated. There is no "automatic standing." *United States v Salvucci*, 448 US 83, 85 (1980). A defendant has the burden of establishing standing and in deciding the issue, the court should consider the totality of circumstances. *People v Powell*, 235 Mich App 557, 561 (1999). A defendant must demonstrate that he or she personally has an

expectation of privacy in the place searched, and that this expectation is reasonable. *Rakas v Illinois*, 439 US 128, 143–144 (1978).

An individual who is an overnight guest in a dwelling may establish that he or she has a reasonable expectation of privacy recognized by the Fourth Amendment in the home of his host. *Minnesota v Olson*, 495 US 91, 96–97 (1990).

A person who is briefly present in a dwelling, with the owner's consent, may not claim the protections intended by the Fourth Amendment. *Minnesota v Carter*, 525 US 83, 90 (1998).

C. Factors Involved in Dwelling Searches

1. Knock and Announce

The Michigan Court of Appeals adopted the holding of the United States Supreme Court in providing that "the Fourth Amendment incorporates the common law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry." *People v Vasquez (On Remand)*, 227 Mich App 108, 109–110 (1997), quoting *Richards v Wisconsin*, 520 US 385, 387 (1997).

> **Note:** The Michigan Supreme Court reversed the Court of Appeals' ruling in *Vasquez, supra*, finding that the evidence obtained in the dwelling search would have fallen under the inevitable discovery doctrine without regard to whether police officers violated the knock and announce rule. *People v Vasquez*, 461 Mich 235 , 241–242 (1999).

Evidence seized pursuant to a violation of the "knock and announce" rule need not always be suppressed. Where the "knock and announce" violation is also a violation of the defendant's Fourth Amendment protections, suppression is appropriate. *People v Howard*, 233 Mich App 52, 60–61 (1998).

> "The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant." MCL 780.656.

2. Knock and Talk

The "knock and talk" investigation technique, where the police seek consent to search for contraband, is not unconstitutional, but is subject to

judicial review to ensure compliance with general constitutional protections. *People v Frohriep*, 247 Mich App 692, 698 (2001).

> "Generally, the knock and talk procedure is a law enforcement tactic in which the police, who possess some information that they believe warrants further investigation, but that is insufficient to constitute probable cause for a search warrant, approach the person suspected of engaging in the illegal activity at the person's residence (even knock on the front door), identify themselves as police officers, and request consent to search for the suspected illegality or illicit items." *Frohriep, supra*, 247 Mich App at 697.

Where police officers were unlawfully in a position in the defendant's backyard because of a misuse of the "knock and talk" tactic, the marijuana plants growing in a shed behind the defendant's house were inadmissible because the vantage point from which the officers saw the plants was unlawfully attained. *People v Galloway*, 259 Mich App 634, 639–642 (2003).

In *Galloway*, the Court concluded that the police officers did not conduct a proper "knock and talk"—rather, the officers bypassed the front door to the defendant's home and walked directly into the defendant's backyard where the marijuana plants were visible. *Galloway, supra*, 259 Mich App at 640–642. Because the officers' entry into the defendant's backyard was unlawful, the plain-view exception did not apply to the marijuana plants seized from the defendant's shed. *Galloway, supra*, 259 Mich App at 639–640.

3. "No Knock" Entry

The requirement that officers knock and announce their intent to enter the premises is circumventable where the police have a "reasonable suspicion" that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile or inhibit the effective investigation of the crime. *United States v Ramirez*, 523 US 65, 67–68 (1998). Additionally, when officers enter the premises in a "no-knock" entry, any resulting damage to the property does not subject the reasonableness of the entry to a higher standard. *Ramirez*, *supra,* 523 US at 71.

4. Warrantless Entry

*See also Section 4.21(D) on exigent circumstances.

The warrantless entry of a dwelling may be justified by "hot pursuit of a fleeing felon, to prevent the imminent destruction of evidence, to preclude a suspect's escape, and where there is a risk of danger to police or others inside or outside a dwelling."* *People v Cartwright*, 454 Mich 550, 558 (1997). See also *Minnesota v Olson*, 495 US 91, 100 (1990).

A police officer may enter a dwelling without a warrant where it is reasonable to believe that a person inside the dwelling is in need of immediate medical assistance. *People v Davis*, 442 Mich 1, 14 (1993); *People v Ohlinger*, 438 Mich 477, 483–484 (1991). The officer must limit his actions to those which are necessary to assess the situation and deliver any assistance which is required. *Ohlinger*, *supra*, 438 Mich at 484. See also *People v Cartwright*, 454 Mich 550, 561–562 (1997).

4.24 Investigatory Stops

US Const, Am IV

Const 1963, art 1, § 2

A. "*Terry*" Stop*

**Terry v Ohio*, 392 US 1 (1968).

An officer may make an investigatory stop upon reasonable suspicion that crime is afoot under the totality of circumstances. This is a standard less than the probable cause standard. An officer upon detention of the vehicle may perform a patdown of the individual to secure the safety of the officer. The officer, upon probable cause, may seize any contraband which is immediately evident. The totality of circumstances standard is used to detect contraband during a patdown. *People v Champion*, 452 Mich 92, 98–100 (1996).

Being in a high crime area and fleeing from police are relevant factors to a determination involving the totality of circumstances. In short, reasonable suspicion must be based on commonsense judgments and inferences about human behavior. *Illinois v Wardlow*, 528 US 119, 125 (2000).

In *People v Chambers*, 195 Mich App 188, 124 (1992), the court held that a twenty minute detention did not transform the "investigative stop" into an illegal arrest. Likewise, where an officer was diligently pursuing a means of investigation that was likely to quickly confirm or deny his suspicions, the detention of the defendant and the codefendant for as long as 45 minutes was not an illegal arrest. *People v Yeoman*, 218 Mich App 406, 407 (1996).

The Supreme Court held that when officers make stops for traffic violations, the Fourth Amendment does not require the officers to expressly inform the individuals stopped that they are free to leave before requesting consent to search the individuals or their vehicles. *Ohio v Robinette*, 519 US 33, 39 (1996).

B. Traffic Stop

Generally, an officer's decision to stop an automobile is reasonable when there is probable cause to believe that the driver violated a traffic law. *Whren v United States*, 517 US 806, 810 (1996). The officer's subjective intentions

do not negate a proper search or seizure based on probable cause. The officers did possess probable cause to detain the motorist for the minor traffic violation and the evidence discovered as a result of the stop was admissible. *Whren, supra*, 517 US at 819.

The issue in *Whren* was the legality of actions taken by plain clothes officers patrolling in an unmarked car. The officers noticed a vehicle of teenagers in a high drug area displaying peculiar behavior. Suddenly the car turned without signaling "and sped off at an 'unreasonable speed.'" *Whren, supra* at 808. The officers pulled the car over and approached the vehicle at which time they observed plastic bags of crack cocaine in the defendant's hands. *Id*. at 809.

C. Evidence Seized Without a Warrant During Investigatory Stops

1. Plain Feel Exception

In *Champion*, *supra*, 442 Mich at 98–101, the officer seized a pill bottle that contained less than 25 grams of cocaine. The seizure of the pill bottle was upheld under the totality of circumstances standard. Factors that contributed to the officer's decision to seize the contraband included the officer's previous knowledge of the defendant's prior drug history, the event occurred in a high crime area, and the officer's additional knowledge that pill bottles were common containers for controlled substances. Although the original intent of the patdown was to secure the safety of the officer, under the totality of circumstances the "plain feel" exception justified the seizure.

In *People v Custer*, 465 Mich 319, 333–334 (2001), the Court ruled that because photographs depicting an individual with large amounts of cocaine were seized from the defendant during a valid pat-down search, the photos were properly examined by the arresting officer. When the officer turned the lawfully seized photographs over to examine their fronts, this was not an unconstitutional search for purposes of the Fourth Amendment. The Court ruled that at that point, the defendant's reasonable expectation of privacy in the outer surfaces of the photographs had already been significantly diminished, at least enough to justify the officer's turning over and looking at the photographs. The Court further found that the photographs provided probable cause to search the defendant's home and should not have been suppressed.

2. Plain Smell Exception

Where a police officer detected the odor of unburned marijuana emanating from a car he had stopped for a traffic violation, the odor alone provided justification to search the car without a warrant. *People v Kazmierczak,* 461 Mich 411, 424 (2000)

D. Standard of Review

In warrantless search and seizure cases, appellate courts should apply a de novo standard of judicial review concerning reasonable suspicion to stop and probable cause to search. *Ornelas v United States*, 517 US 690, 699 (1996).

4.25 Search Warrants

US Const, Am IV

Const 1963, art 1, § 11

MCL 780.651 *et seq*. Search warrants

A. Generally

There are three requirements for issuing a valid search warrant*—(1) probable cause; (2) affidavit (on oath or affirmation); and (3) specific description of place to be searched and items to be seized during search.

*See *Criminal Procedure Monograph 2: Issuance of Search Warrants* (MJI, 2003), for more information.

B. Probable Cause

Under both the state and federal constitutions, unreasonable searches and seizures are prohibited. US Const, Am IV; Const 1963, art 1, § 11. Both constitutions require that search warrants shall be issued only upon probable cause supported by oath or affirmation. The issuance of search warrants is governed by statute. MCL 780.651–.654.

C. Affidavit

By statute, the affidavit may be based upon reliable information supplied to the complainant from a credible person, named or unnamed, so long as the affidavit contains affirmative allegations that the person spoke with personal knowledge of the matters contained therein. MCL 780.653. See *People v Sherbine*, 421 Mich 502 , 507(1984).

To provide adequate support for a warrant, the affidavit need not prove anything. It need only provide a substantial basis for concluding that a search would uncover evidence of wrongdoing. The affidavit must be read in a commonsense and realistic manner. *People v Whitfield*, 461 Mich 441, 444 (2000).

In *Franks v Delaware*, 438 US 154, 155–156 (1978), the Supreme Court held that when a

> "defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request."

The defendant's burden of proof is a preponderance of the evidence. *People v Stumpf*, 196 Mich App 218, 224 (1992).

According to the Michigan Supreme Court:

> "At a *Franks* hearing, evidence may be suppressed only upon a showing that false material essential to probable cause was knowingly or recklessly included. Both the people and the defendant may present evidence." *People v Reid*, 420 Mich 326, 336 (1984).

See also *People v Williams*, 240 Mich App 316, 319–320 (2000).

Exclusion of evidence is not necessarily the remedy for non-compliance with the statutory affidavit requirements for obtaining a valid search warrant. *People v Hawkins*, 468 Mich 488, 500 (2003). If the affidavit is deficient, then the invalid portion of the warrant should be stricken. See *People v Kalchik*, 160 Mich App 40, 52–54 (1987). If the remaining content is insufficient to support a finding of probable cause, the search warrant is void and any evidence seized as a result is inadmissible. If portions of the affidavit are invalid, but other portions are valid, then the evidence seized under the valid portions may be admissible, if the valid portions support a finding of probable cause. *People v Kolniak*, 175 Mich App 16, 21–23 (1989).

Information received from a fellow officer may be used as the basis for a warrant affidavit. When one police officer receives information from another, the law assumes the source is credible and the magistrate may likewise consider the source to be credible. However, this does not relieve the affiant from the obligation to inform the magistrate of the fact the information was received from a fellow officer and the reason or reasons for finding the information reliable. *People v Mackey*, 121 Mich App 748, 753–754 (1982).

Crime victims and identified citizens are also presumptively reliable. *People v Powell*, 201 Mich App 516, 521–523 (1993).

The exclusionary rule does not apply to evidence obtained as the result of statutory or court rule violations having no constitutional implications. *People v Hawkins*, 468 Mich 488, 500 (2003).

D. Description

The Fourth Amendment requires that a search warrant "particularly describ[e] the place to be searched, and the persons or things to be seized." US Const, Am IV. Each warrant shall designate and describe the house or building or other location or place to be searched and the property or thing to be seized. MCL 780.654.

The test for determining the sufficiency of the description of the place to be searched is:

> (1) whether the place to be searched is described with sufficient particularity to enable the executing officer to locate and identify the premises with reasonable effort, and
>
> (2) whether there is any reasonable probability that another premises might be mistakenly searched. *People v Hampton*, 237 Mich App 143, 150–151 (1999); *People v McGhee*, 255 Mich App 623, 626 (2003).

Types of property that may be subject to seizure under a warrant is described in MCL 780.652. These include contraband, items designed and intended for use in the commission of the crime, or evidence of a crime or criminal conduct.

> "Under both federal constitutional law and Michigan search and seizure law, the purpose of the particularization requirement in the description of items to be seized is to provide reasonable guidance to the executing officers and to prevent their exercise of undirected discretion in determining what is subject to seizure . . . . The degree of specificity required depends on the circumstances and types of items involved." *People v Zuccarini*, 172 Mich App 11, 15 (1988).

Authorization to search the entire premises where evidence of suspected illegal activity may be obtained must be viewed from an abuse of discretion standpoint. As long as the warrant describes the area to be searched with particularity, it will not be deemed to be overbroad. *In re Forfeiture of $28,088*, 172 Mich App 200, 207 (1988).

E. Execution

Although an affidavit becomes part of the "copy of the warrant" that must be left pursuant to MCL 780.655, failure to comply with that statutory requirement does not require suppression of evidence where the defendant has the opportunity to challenge probable cause and the requirement is merely procedural. *People v Garvin*, 235 Mich App 90, 99–100 (1999). See also *People v Sobczak-Obetts*, 463 Mich 687, 710–712 (2001).

F. Anticipatory Search Warrants

An anticipatory search warrant is a warrant based on a showing of probable cause that at some future time, but not presently, certain evidence of crime will be located at a specified place; a magistrate issuing such a warrant should take care to require independent evidence establishing probable cause that the contraband will be located at the premises at the time of the search; further, the magistrate should protect against its premature execution by listing in the warrant the conditions governing its execution. *People v Kaslowski*, 239 Mich App 320, 324 (2000).

G. Standard of Review

The propriety of a search warrant is determined by whether a reasonably cautious person could have concluded there was a substantial basis for the finding of probable cause. *People v Russo*, 439 Mich 584, 603 (1992).

A search warrant and the underlying affidavit are to be read in a common-sense and realistic manner, with deference to the magistrate's decision, to insure there is a substantial basis for the magistrate's conclusion that there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Russo*, *supra* at 604. See also *People v Garvin*, 235 Mich App 90, 102–105 (1999); *People v Jordan*, 187 Mich App 582, 586–589 (1991); *People v Sundling*, 153 Mich App 277, 285–287 (1986); *People v Dinsmore*, 103 Mich App 660, 673–674 (1981).

A reviewing court may only consider the information available to the magistrate and on which the magistrate relied in issuing the warrant. *People v Sloan*, 450 Mich 160, 168–169 (1995), overruled in part on other grounds 460 Mich 118 (1999). A reviewing court should confirm that the magistrate's decision was based on actual facts rather than on unsupported assertions of the affiant. *Id*.

Time as a factor in the determination of probable cause is weighed and balanced in light of other variables, such as whether the crime is a single instance or an ongoing pattern of violations. *Russo*, *supra*, 439 Mich at 605–606; *People v Sundling*, 153 Mich App 277, 286–287 (1986). This issue is determined by the circumstances of each case, *Russo*, *supra* at 606; *People v Smyers*, 47 Mich App 61, 73 (1973), aff'd 398 Mich 635 (1976).

Part III—Discovery and Required Notices (MCR Subchapter 6.200)

4.26 Discovery

MCR 6.001(D)(3) Scope; applicability of civil rules; superseded rules and statutes

MCR 6.201 Discovery

A. Generally

A criminal defendant has a due process right of access to information possessed by the prosecutor that might lead a jury to entertain a reasonable doubt about the defendant's guilt. *Brady v Maryland*, 373 US 83, 87 (1962); *Giglio v United States*, 405 US 150, 154 (1972). This includes impeachment evidence as well as exculpatory evidence. *United States v Bagley*, 473 US 667, 676 (1985).

In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence and could not have obtained it by the exercise of reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, there exists a reasonable probability that the outcome of the proceedings would have been different. *People v Lester*, 232 Mich App 262, 281–282 (1998).

The federal constitution does not require the disclosure of material impeachment evidence prior to entering a plea agreement. *United States v Ruiz*, 536 US 622, 633 (2002). However, the United States Supreme Court has indicated there is an ongoing obligation to disclose exculpatory or impeachment evidence even after conviction. See *Banks v Dretke*, 540 US 668 (2004).

A trial court may grant a motion for discovery on two different grounds. First, MCR 6.201* makes certain discovery mandatory and requires both the defense and the prosecution, on request, to provide discovery. *People v Phillips*, 468 Mich 583, 589 (2003); *People v Laws*, 218 Mich App 447, 454–455 (1996). Second, in a criminal case, a trial court has the discretion to grant additional discovery. *People v Johnson*, 168 Mich App 581, 584 (1988); *People v Valeck,* 223 Mich App 48, 50 (1997).

*Amendments to MCR 6.201 have been proposed.

A defendant's right to due process is implicated when exculpatory evidence is suppressed without regard to whether the defendant made a timely and specific request for discovery. *People v Tracey*, 221 Mich App 321, 324 (1997).

Before the Michigan Supreme Court decided *People v Lemcool*, 445 Mich 491 (1994), there was a split of authority in the Court of Appeals concerning whether the prosecution had a right to discovery from a defendant with regard to tangible physical evidence, witness lists, etc. See *People v Paris*, 166 Mich App 276 (1988) (no prosecution discovery); *People v Johnson*, 168 Mich App 581 (1988) (prosecution discovery within discretion of court).

In *Lemcool*, the Michigan Supreme Court specifically held that where the prosecution already disclosed its witnesses and laboratory reports and provided copies of police reports, it was not error for the circuit court to order the defendant to provide names and addresses of expert and lay witnesses as well as a list of the physical evidence the defendant intended to use at trial. *Lemcool*, 445 Mich at 500.

Before *Lemcool*, the Michigan Legislature enacted MCL 767.94a, which provided for discovery from criminal defendants. The Michigan Supreme Court subsequently adopted a new court rule, MCR 6.201, which supersedes MCL 767.94a. *People v Phillips*, 468 Mich 583, 589 (2003); *People v Pruitt*, 229 Mich App 82, 86–88 (1998). MCR 6.201 requires both the defense and prosecution, on request, to provide discovery.

*MCR 6.610(F)(1)–(2), as proposed.

MCR 6.201 applies to felony preliminary examinations. *Pruitt*, *supra,* 229 Mich App at 87. It does not apply to misdemeanor cases. Administrative Order No 1999-3, 442 Mich cxii (1993). Proposed amendments to MCR 6.610* would add provisions to allow for certain mandatory and reciprocal discovery in criminal cases over which the district court has jurisdiction.

B. Scope of Discovery

The trend in Michigan and other states is toward broad criminal discovery, and the prosecution is not merely a participant in the contest of trial but has a duty to seek justice. *People v Browning*, 108 Mich App 281, 307 (1981). MCL 767.40a requires the prosecution to send to defendant a list of witnesses it intends to produce at trial not less than 30 days before trial.

When the prosecution receives a specific and relevant discovery request, it has a duty to respond to that request. The failure to respond is seldom, if ever, excusable. *United States v Agurs*, 427 US 97, 106 (1976). Some evidence has such obvious substantial value to the defense that the prosecution must disclose it, even without a specific request. *Id*. The prosecution is further obligated to make known all evidence of which it has knowledge bearing upon the charged offense, whether or not the evidence is favorable or unfavorable; the prosecution is all the more obligated when the defense affirmatively demands an evidentiary item it has reason to believe is in the possession or control of the prosecution. *People v Miller*, 51 Mich App 117, 119 (1974).

Discovery is not limited to that information which is admissible at trial. The focus should be whether fundamental fairness requires that the defendant have access to the requested information. *People v Walton*, 71 Mich App 478, 481–

482 (1976). The defendant has the burden of showing facts indicating that the information sought is necessary to preparation of the defense and in the interest of a fair trial, and not simply a fishing expedition. *People v Maranian,* 359 Mich 361, 368 (1960). In order to obtain a copy of police reports, the defendant must make a showing of need to obtain them, unless the showing would result in self-incrimination. *People v Denning*, 140 Mich App 331, 333 (1985). If necessary, the trial court should conduct an in camera inspection of the material sought to determine whether it contains information relevant to the defense. *Walton, supra*, 71 Mich App at 485; *People v Baskin*, 145 Mich App 526, 538–539 (1985).

In *Strickler v Greene*, 527 US 263 (1999), the prosecution was unaware of interview notes held by the investigating officer which could be used to impeach an eyewitness. The notes were discovered after the defendant was convicted and sentenced to death. The United States Supreme Court held that the notes were exculpatory material under the rule of *Brady v Maryland*, 373 US 83, 87 (1962), and should have been disclosed. The Court declined to reverse the defendant's conviction and sentence, however, because the "petitioner has not shown that there is a reasonable probability that his conviction or sentence would have been different had these materials been disclosed." *Strickler, supra,* 527 US at 296.

In granting or denying pretrial discovery, the trial court should consider whether the defendant's rights can be fully protected by cross-examination. *People v Graham,* 173 Mich App 473, 477 (1988).

C. Privilege

MCR 6.201(C) Prohibited discovery

MCR 6.201(D) Excision

Work product of the prosecution and the police department is not discoverable. *People v Holtzman*, 234 Mich App 166, 169 (1999); *People v Gilmore*, 222 Mich App 442, 453 (1997). A defendant does not have the right to access information which is protected from disclosure by constitution, statute, or privilege. MCR 6.201(C).

If a defendant demonstrates a good-faith belief that records which are privileged are necessary to the defense, the court may be asked to conduct an in camera inspection of documents or witnesses. Such inspection is necessary when a criminal defendant establishes that requested privileged material is necessarily related to his or her guilt or innocence. The court may utilize in camera review to inspect or screen questionable evidence or testimony which as a whole may have otherwise been inadmissible. MCR 2.302(B), (C).

"The test for in camera review is a plausible showing of need and materiality. The test for disclosure and use is whether there is a reasonable probability that material and necessary information would affect the fact finder's

determination of guilt or innocence." *People v Stanaway*, 446 Mich 643, 700 (1994). If the court is satisfied that the requested records reveal evidence necessary to the defense, the evidence will then be made available to defense counsel. MCR 6.201(D). See *People v Fink*, 456 Mich 449, 453–455 (1998).

The purpose of the in camera hearing is to determine if any of the privileged information is material to the case. Evidence is material only if there is a reasonable probability that the trial result would have been different had the evidence been disclosed when the discovery was denied. *Fink, supra*, 456 Mich at 454.

1. Confidential Informant

If a defendant can demonstrate a possible need for an informant's testimony, the court should conduct an in camera hearing to interview the informant to determine whether the informant can offer helpful testimony. *People v Underwood*, 447 Mich 695, 704–707 (1994); *People v Wyngaard*, 226 Mich App 681, 684 (1997).

2. Criminal Sexual Conduct—Rape Shield Law

*See Section 4.27 for more information.

Evidence of a rape victim's sexual conduct is not admissible at trial unless it is found to be relevant during an in camera hearing.* This safeguard is intended to protect the victim from becoming a defendant. Such evidence is not admissible unless the judge finds that the probative value of the evidence outweighs the prejudicial nature. Established guidelines are found in MCL 750.520j(1) and (2).

In camera review is necessary when the defendant seeks to obtain privileged records that are likely to contain information necessary to the defense. The court will only permit evidence that has been determined to be necessary to the defense. *People v Stanaway*, 446 Mich 643, 649–650 (1994).

If the evidence is material to the defendant's defense, the privileged information must be disclosed to protect the defendant's Sixth Amendment right to confrontation. *People v Adamski*, 198 Mich App 133, 138–139 (1993).

3. Grand Jury Proceedings

A person indicted by a grand jury is entitled to the part of the record that touches on the guilt or innocence of the accused. MCR 6.107(A). When a timely motion to obtain the records is made by the accused, the chief judge must conduct an in camera review of the entire grand jury record. MCR 6.107(B)(1)–(3). Following the in camera inspection, the chief judge shall certify the parts of the record touching on the accused's guilt or innocence and have two copies made of the certified content. One copy must be delivered to the prosecution and one copy must be delivered to the defendant or the defendant's counsel. MCR 6.107(B)(4).

D. Violation of Discovery Order

Suppression by the prosecution of evidence favorable to an accused after the accused has requested discovery violates due process where the evidence is material either to guilt or to punishment, without regard to the good faith or bad faith of the prosecution. *Brady, supra*, 373 US at 87. The duty to disclose information to the accused extends to impeachment evidence that is material to the case. *People v Snell*, 118 Mich App 750, 761–762 (1982). Evidence is material if there is a reasonable probability that, had the requested evidence been disclosed to the defense, the result of the trial would have been different. *United States v Bagley*, 473 US 667, 674–675 (1985); *People v Torrez*, 90 Mich App 120, 124 (1979).

"When determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance. *People v Banks*, 249 Mich App 247, 252 (2002).

For remedies available for prosecution violations of discovery orders, see *People v Clark*, 164 Mich App 224, 229 (1987); *People v Taylor*, 159 Mich App 468, 471 n 4 (1987). These cases disclose that the Court of Appeals has rejected the rule requiring dismissal if the prosecutor has failed to disclose evidence unless the failure was harmless beyond a reasonable doubt. Instead, appropriate remedies are left to the discretion of the court, after determining the legitimate interests of the courts and the parties and how they may be affected by the remedial choices. However, the Court of Appeals affirmed the dismissal of the case in response to the prosecution's complete failure to provide timely discovery. *People v Davie (After Remand)*, 225 Mich App 592, 598 (1997).

The right to compulsory process is not violated by the exclusion of a witness' testimony when the explanation for the failure to comply with an applicable discovery rule reveals that such failure was both willful and motivated by a desire to obtain a tactical advantage or to conceal a plan to present fabricated testimony. *Taylor v Illinois*, 484 US 400, 414 (1988).

E. Out-of-State Witnesses

A motion in a criminal proceeding for the appointment of a commission to examine material witnesses who are residing out-of-state is addressed to the discretion of the trial court. MCL 767.77–767.78.

> "The moving party has the burden of demonstrating the availability of the proposed witnesses and their willingness to appear, the materiality of the testimony which it is expected they will give, and that injustice will result if the motion is denied [internal citations omitted]." *People v Hayes*, 36 Mich App 690, 692 (1971).

F. Bill of Particulars

Note: The advent of discovery in criminal cases under MCR 6.201 appears to have supplanted the use of the bill of particulars.

MCR 6.112(E) states that the court, on motion, may order the prosecutor to provide the defendant a bill of particulars describing the essential facts of the alleged offense. The provision of MCL 767.44 states that the prosecuting attorney, if seasonably requested by the respondent, shall furnish a bill of particulars setting up specifically the nature of the offense charged.

Case law suggests that MCL 767.44 applies only to indictments using the statutory short form. *People v Missouri*, 100 Mich App 310, 330 (1980); *People v Harbour*, 76 Mich App 552, 556 (1977). That is, a defendant charged under a statutory short form may seasonably request a bill of particulars. In general, it is error for a trial court to deny a motion for a bill of particulars where the defendant is charged with the short-form information or indictment. *People v Iaconnelli*, 112 Mich App 725, 762 (1982).

Case law also suggests that where a preliminary examination adequately informs a defendant of the charge against him, the need for a bill of particulars is obviated. *Harbour, supra*, 76 Mich App at 557; *People v Earl*, 299 Mich 579, 581 (1941). In *Earl*, the Supreme Court concluded that the information followed the wording of the statute, stated an offense thereunder, and the defendant's several motions to quash were without merit.

The denial of a motion for a bill of particulars where a long-form indictment is used is erroneous only where it constitutes an abuse of discretion by the trial judge. *People v Tenerowicz*, 266 Mich 276, 288 (1934); *People v Jones,* 75 Mich App 261, 269 (1977).

If the defendant has been denied an adequate bill of particulars, the question then becomes what remedy is available to the defendant. The defendant must demonstrate actual prejudice resulting from the error to receive a reversal of a conviction. *Missouri*, *supra*, 100 Mich App at 331. If no prejudice is shown, the defendant is not entitled to a remedy, i.e., to a new trial. *Iaconnelli, supra*, 112 Mich App at 765–766.

G. Standard of Review

A trial court's decision regarding discovery is reviewed for an abuse of discretion. *People v Phillips*, 468 Mich 583, 587 (2003).

A trial court's decision on a defendant's motion for mistrial based on a discovery violation is reviewed for an abuse of discretion. *People v Banks*, 249 Mich App 247, 252 (2002).

A trial court's decision regarding the appropriate remedy for non-compliance with a discovery order is reviewed for an abuse of discretion. *Davie, supra,* 225 Mich App at 597–598.

4.27 Rape Shield Law

MCL 750.520j Admissibility of evidence; victim's sexual conduct

MCL 600.2163a Definitions; prosecutions and proceedings to which section applicable; use of dolls or mannequins; support person; notice; videorecorded statement; special arrangements to protect welfare of witness; videotape deposition; section additional to other protections or procedures; violation as misdemeanor; penalty.

A. Authority

MCL 750.520j provides:

> "(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> > "(a) Evidence of the victim's past sexual conduct with the actor.
> >
> > "(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.
>
> "(2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1)."

B. *In Camera* Hearing

> "A hearing held outside the presence of the jury to determine admissibility promotes the state's interests in protecting the privacy rights of the alleged rape victim while at the same time safeguards the defendant's right to a fair trial. Furthermore, this procedure establishes a record of the evidence for appellate review of the trial court's ruling.
>
> * * *
>
> "At this hearing, the trial court has, as always, the responsibility to restrict the scope of cross-examination to prevent questions which would harass, annoy, or humiliate sexual assault victims and to guard against mere fishing expeditions. Moreover, the trial court continues to possess the discretionary power to exclude relevant evidence offered for any purpose where its probative value is substantially outweighed by the risks of unfair prejudice, confusion of issues, or misleading the jury. . . . [I]n ruling on the admissibility of the proffered evidence, the trial court should rule against the admission of evidence of a complainant's prior sexual conduct with third persons unless that ruling would unduly infringe on the defendant's constitutional right to confrontation [internal citations omitted]." *People v Hackett*, 421 Mich 338, 350–351 (1984).

C. Motion and Offer of Proof

"[A] rape defendant must file a written motion and offer of proof in order to obtain a hearing in camera to determine whether certain evidence related to the victim's sexual conduct may be presented[.]" *People v Lemcool*, 200 Mich App 77, 79 n 1 (1993), rev'd on other grounds 445 Mich 491 (1994). See also *People v Perkins*, 424 Mich 302, 306–307 (1986).

> "The defendant is obligated initially to make an offer of proof as to the proposed evidence and to demonstrate its relevance to the purpose for which it is sought to be admitted. Unless there is a sufficient showing of relevancy in the defendant's offer of proof, the trial court will deny the motion. If there is a sufficient offer of proof as to a defendant's constitutional right to confrontation, as distinct simply from use of sexual conduct as evidence of character or for impeachment, the trial court shall order an in camera evidentiary hearing to determine the admissibility of such evidence in light of the constitutional inquiry previously stated." *Hackett*, *supra*, 421 Mich at 350.

D. Defendant's Failure to Provide Notice

The trial court must determine whether preclusion of evidence offered by the defendant based on the defendant's noncompliance with the statutory notice requirement violates the defendant's Sixth Amendment rights. The trial court should consider the legislative intent to protect victims from surprise, harassment, unnecessary invasions of privacy, and undue delay:

> "[Where] a defendant does not comply with the statutory notice provision, the trial court should also consider the timing of the defendant's offer to produce evidence of this nature. The closer to the date of trial the evidence is offered, the more this factor suggests wilful misconduct designed to create a tactical advantage and weighs in favor of exclusion." *People v Lucas (On Remand)*, 193 Mich App 298, 303 (1992).

The Court of Appeals affirmed its holding in *Lucas* in a supplemental opinion. See *People v Lucas (After Remand)*, 201 Mich App 717, 719 (1993).

"[Where the d]efendant failed to file a motion or offer of proof on the matter within the required time frame," the trial court did not abuse its discretion in excluding evidence of the complainant's past sexual activity. *People v Hurt*, 211 Mich App 345, 352 (1995).

E. Evidence of Victim's Past Sexual Conduct

> "[I]n *People v Hackett*, *supra*, we concluded that the exclusion of evidence outside the exceptions stated under the rape-shield statute may violate the Sixth Amendment with regard to an individual defendant." *People v LaLone*, 432 Mich 103, 126 (1989).

The admissibility of evidence under the rape-shield statute is a matter left to the court's discretion. The court should err on the side of excluding evidence of a complainant's sexual conduct when to do so would not unconstitutionally infringe on the defendant's right to confrontation. *Hackett, supra*, 421 Mich at 349.

The policy underlying the rape-shield statute is the Legislature's determination that

> "in the overwhelming majority of prosecutions, the introduction of the complainant's sexual conduct with parties other than the defendant is neither an accurate measure of the complainant's veracity nor determinative of the likelihood of consensual sexual relations with the defendant." *LaLone, supra*, 432 Mich at 125.

Case law routinely recognizes that a complainant's prior sexual conduct "has little or no relevancy to the issue of complainant's consent with defendant as to the incident in question." *Hackett, supra*, 421 Mich at 354. Likewise, a complainant's reputation as a prostitute is not logically related to his or her veracity. *People v Williams,* 416 Mich 25, 45 (1982). Similarly, that a person is homosexual is not logically related to the issues of consent or credibility. *Hackett, supra*, 421 Mich at 353.

> "[A]bsent extraordinary circumstances, a complainant's reputation for unchastity or specific instances of complainant's past sexual conduct with third persons is ordinarily irrelevant and inadmissible to show consent." *Hackett*, *supra* at 355.

The *Hackett* Court repeated some examples of "extraordinary circumstances" from a case in the Eighth Circuit Court of Appeals:

> "'Such circumstances might include where the evidence is explanative of a physical fact which is in evidence at trial, such as the presence of semen, pregnancy, or the victim's physical condition indicating intercourse, or where the evidence tends to establish bias, prejudice, or an ulterior motive surrounding the charge of rape. Sexual history might also be relevant where the victim has engaged in a prior pattern of behavior clearly similar to the conduct immediately in issue [citations omitted].'" *Hackett*, *supra* at 355 n 4, quoting *United States v Kasto*, 584 F2d 268, 271 n 2 (CA 8, 1978).

> "The fact that the Legislature has determined that evidence of sexual conduct is not admissible as character evidence to prove consensual conduct or for general impeachment purposes is not however a declaration that evidence of sexual conduct is never admissible. We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. Moreover in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge. Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past [internal citations omitted]." *Hackett*, *supra* at 348.

Evidence regarding a victim's past sexual conduct with the defendant is relevant to the determination of whether the acts between the defendant and alleged victim which formed the basis of the charge were consensual. *People v Perkins*, 424 Mich 302, 309 (1986).

In *People v Adair*, 452 Mich 473, 483 (1996), the Court found that "past" sexual conduct referred to conduct which occurred before the evidence is offered at trial. The Court determined that such evidence did not become legally irrelevant and inadmissible simply because it occurred *after* the incident of alleged criminal sexual conduct. *Adair, supra* at 483. However, evidence of a victim's past sexual conduct with the defendant is only admissible to the extent that it is determined to be material to a factual issue, and if it is determined that its prejudicial or inflammatory nature does not outweigh its probative value. *Id*. at 485.

In *People v Bone*, 230 Mich App 699, 703–704 (1998), the Court, applying MRE 404(a)(3), held that the prosecutor could not refer to the victim's virginity as being the reason she did not consent. The Supreme Court has permitted evidence that the complainant was "ready to have sex" as probative of the issue of consent. *People v Ivers*, 459 Mich 320, 330 (1998).

Evidence that a victim is a prostitute is not admissible to attack her credibility because there is no logical nexus between the victim's reputation as a prostitute and her character for being truthful. *People v Slovinski*, 166 Mich App 158, 174–175 (1988). But evidence that the victim was engaged in prostitution during the alleged offense is admissible to establish a defense of consent, if such evidence is probative on the issue of consent and had a tendency to make it more probable than not that the victim had engaged in sexual intercourse for money. *Id*. at 177.

F. Discovery of Counseling Records

Where a defendant can establish a reasonable probability that privileged communication and juvenile division records are likely to contain material information necessary to the defense, a review of those records in camera must be conducted. Only when the trial court finds such evidence should it be provided to the defendant. *People v Stanaway*, 446 Mich 643, 680–681 (1994).

Stanaway does not require an in camera hearing simply because psychological harm is the alleged "personal injury" which must be established to satisfy the "personal injury" element of first-degree criminal sexual conduct. Under *Stanaway*, the defendant must establish a "reasonable probability" that the records contain information material to his defense. *People v Tessin*, 450 Mich 944, 944 (1995).

G. Prior False Allegations of CSC

"[T]he defendant should be permitted to show that the complainant has made false accusations of rape in the past." *Hackett*, *supra* at 348. See also *People v Yarger*, 193 Mich App 532, 538 (1992); *People v Mikula*, 84 Mich App 108, 115 (1978). The court has discretion in determining admissibility. *Hackett*, *supra* at 349.

H. Prior Conviction of Another Person for CSC Involving the Victim

An in camera hearing should be conducted regarding a defendant's claim that children had made prior claims of CSC to which another man pleaded guilty to determine whether relevant, whether the other person was convicted, and whether the underlying facts are significantly similar to be relevant. *People v Morse,* 231 Mich App 424, 437 (1998).

> "Accordingly, Michigan law dictates that an in camera hearing is appropriate to determine whether: (1) defendant's proffered evidence is relevant, (2) defendant can show that another person was convicted of criminal sexual conduct involving the complainant, and (3) the facts underlying the previous conviction are significantly similar to be relevant to the instant proceeding." *Id*.

I. Special Arrangements to Protect Victim

*See Chapter 2, Section 2.25 for information about child witnesses.

MCL 600.2163a permits special arrangements for the testimony of children* or other impaired persons. Right of confrontation concerns have been addressed by *People v James*, 182 Mich App 295, 298–299 (1990) and *People v Kasben*, 158 Mich App 252, 254–255 (1987). See also *In re Deeren*, 158 Mich App 539, 542 (1987).

In *People v Burton*, 219 Mich App 278, 290 (1996), the court addressed the use of victim testimony by closed-circuit television where MCL 600.2163a does not apply, indicating it should be used only in extreme cases after making findings that it is necessary. See also *United States v Moses*, 137 F3d 894 (CA 6, 1998).

4.28 Alibi Defense

MCL 768.20 Alibi as defense; notice to prosecutor; notice of rebuttal to defendant, additional witnesses

MCL 768.21 Alibi or insanity defenses; effect of failure to file notices

CJI2d 7.4 Defenses; lack of presence (alibi)

A. Notice

MCL 768.20 requires the defendant to give written notice to the prosecuting attorney of his or her intent to offer an alibi defense. MCL 768.20(1). Notice may be given at arraignment or within 15 days after arraignment, but notice must be given not less than ten days before the trial, or at such other time as the court directs. *Id*. The notice shall contain the names of witnesses and

specific information about the place where the accused claims to have been at the time the charged offense was committed. *Id*.

Within ten days after receipt of the notice, but not later than five days before trial, or at such other time as the court may direct, the prosecuting attorney shall file and serve on the defendant a notice of rebuttal containing the names of the witnesses the prosecuting attorney proposes to call to controvert the defendant's alibi defense. MCL 768.20(2). Each party has a continuing duty to disclose promptly the names of additional witnesses that come to its attention who may be called to establish or rebut an alibi defense. MCL 768.20(3). Additional witnesses (not identified in the first notices) may be permitted to testify if the moving party gives notice to the opposing party and shows that the additional witness' name was not known when the notice required under MCL 768.20(1) and (2) was due and could not have been discovered with due diligence. MCL 768.20(3).

Interpretation of MCL 768.20 requires that a notice of alibi be permitted if filed not more than ten days before trial, even if it is filed more than 15 days after arraignment. *People v Bennett*, 116 Mich App 700, 704–705 (1982).

Filing a notice of an alibi defense does not require that the defendant proceed with that defense at trial and no comment should be made upon the failure to do so. *People v Dean*, 103 Mich App 1, 6–7 (1982). However, if defendant puts forth an alibi defense, the prosecutor may comment on defendant's failure to produce corroborating witnesses. *People v Fields*, 450 Mich 94, 111 (1995); *People v Holland*, 179 Mich App 184, 190 (1989).

B. Failure to Give Notice

MCL 768.21 provides that if the defendant fails to give timely notice of his or her intent to raise an alibi defense, the court shall exclude evidence offered for the purpose of establishing the alibi. MCL 768.21(1). Similarly, the court shall exclude rebuttal evidence by the prosecution if the prosecuting attorney has failed to give the timely notice of rebuttal. MCL 768.21(2). Even if timely notice is given by both parties, the court shall exclude testimony from witnesses not particularly identified in the required notices. MCL 768.21(1) and (2). However, case law suggests the court may abuse its discretion if it does not permit a party to proceed with the defense or rebuttal despite the failure to give the statutory notice. See *People v Travis*, 443 Mich 668, 679–683 (1993), which sets forth considerations for the exercise of the court's discretion at page 682.

Travis, supra, adopted the test set forth in *United States v Myers*, 550 F2d 1036, 1043 (CA 5, 1977). To determine whether an undisclosed alibi witness' testimony should be admitted, the court should consider:

- whether and what amount of prejudice will result from the failure to disclose;

- the reason for the failure to disclose;
- whether and to what extent the harm caused by nondisclosure could be mitigated by subsequent events;
- the weight of other properly admitted evidence showing the defendant's guilt; and
- any other relevant factors involved in the circumstances of the case. *Travis, supra* at 682–683.

According to the *Travis* Court, the *Myers* test

> "takes into account not only the diligence of the prosecution, but also the conduct of the defendant and the degree of harm done to the defense. It tends to protect the prosecution in cases where the defendant is at fault or where the defendant suffers little or no prejudice. At the same time, it tends to protect the defendant when the conduct of the prosecution unfairly limits the defendant's choice of trial strategy[.]" *Id*. at 683.

See also *People v Burwick*, 450 Mich 281, 291–294 (1995) and *People v Merritt*, 396 Mich 67, 79–83 (1976). Even if timely notice of the alibi defense is not given, the defendant must still be permitted to testify about the existence of an alibi defense. *Merritt, supra,* 396 Mich at 89; *People v McGinnis*, 402 Mich 343, 346 (1978). In that situation, the instruction on alibi must be given if requested. *Id*.

When there is a failure to give timely notice of alibi, a trial court may be required to grant a requested continuance.* See *Bennett*, *supra,* 116 Mich App at 707.

*See Section 4.20 for a more detailed discussion of a trial court's decision to grant or deny a continuance.

C. Impeachment with Alibi Notice

An alibi notice can be a party opponent admission under MRE 801(d)(2)(c) and used for impeachment of the defendant. *People v McCray*, 245 Mich App 631, 636–637 (2001). The court distinguished cases precluding prosecutor comments on the failure to present an alibi defense after filing notice of the defense or failure to produce a witness listed in the notice.

D. Cross-Examination of Alibi Witness

No special foundation is required before cross-examining an alibi witness about the witness' failure to come forward with the alibi information at an earlier time. *People v Gray,* 466 Mich 44, 49 (2002).

E. Jury Instruction

CJI2d 7.4 is the jury instruction for alibi. Where the defendant raises an alibi defense and requests the instruction, it is reversible error to fail to give it. *People v McGinnis*, 402 Mich 343, 345–347 (1978); *People v Burden*, 395 Mich 462, 466 (1975).

F. Standard of Review

The decision of a trial court to permit or preclude alibi witnesses is reviewed for an abuse of discretion. *Merritt*, *supra*, 396 Mich at 83–84.

4.29 Defenses Involving a Defendant's Mental Status

MCR 6.303 Plea of guilty but mentally ill

MCR 6.304 Plea of not guilty by reason of insanity

MCL 330.1750 Mental health code; privileged communications

MCL 330.2050 Acquittal by reason of insanity; commitment; examination; report; petition; hearing; disposition

MCL 768.20a Insanity defense; notice to court and prosecutor; examinations; notice of rebuttal; admissibility of report in evidence

MCL 768.21a Legal insanity; defined, affirmative defense; under the influence of alcohol or controlled substances; burden of proof

MCL 768.29a Insanity; instructions to jury; verdict

MCL 768.36 Verdict or plea of guilty but mentally ill; requirements; sentence; treatment; conditions for parole and probation

CJI2d 7.9 Meanings of mental illness, mental retardation and legal insanity

CJI2d 7.11 Burden of proof

CJI2d 7.12 Definition of guilty but mentally ill

CJI2d 7.13 Insanity at the time of the crime

CJI2d 7.14 Permanent or temporary insanity

A. Diminished Capacity

There is no defense of diminished capacity. *People v Carpenter*, 464 Mich 223, 235–236 (2001).

B. Not Guilty By Reason of Insanity

1. Affirmative Defense

Insanity is an affirmative defense for which the defendant has the burden of proof by a preponderance of the evidence. MCL 768.21a(3).

2. Timely Notice Required

The defendant must file and serve on the court and the prosecuting attorney a notice of his or her intention to assert the defense of insanity not less than 30 days before trial, or at another time as directed by the court. MCL 768.20a(1).

3. Experts and Reports

The defendant must be referred to the center for forensic psychiatry for an examination. MCL 768.20a(2).

The defendant must cooperate with the examination. The failure to cooperate, if established at a hearing, bars any testimony of insanity, and this bar is constitutional. MCL 768.20a(4); *People v Hayes*, 421 Mich 271, 275 (1984).

Both the prosecution and defense may obtain examinations from independent examiners. MCL 768.20a(3).

Reports are required and must be provided to both parties. MCL 768.20a(6).

Statements made by the defendant during examination shall not be admissible on any issues other than his or her mental illness or insanity at the time of the alleged offense. MCL 768.20a(5).

4. Jury Instruction

Pursuant to MCL 768.29a(1), if a defendant asserts a defense of insanity in a criminal action tried before a jury, the court must instruct the jury on the definitions of mental illness, mental retardation, and legal insanity immediately before the commencement of testimony, especially expert testimony. The instruction must be given in all cases and not simply when a trial court believes that it would be useful. However, failure to give the instruction does not require automatic reversal. *People v Grant*, 445 Mich 535, 537 (1994).

5. Definition

Pursuant to MCL 768.21a, a person is legally insane if, as a result of mental illness as defined in MCL 330.1400a,* or as a result of mental retardation as defined in MCL 330.1500, that person lacks substantial capacity either to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law.

*Repealed by 1995 PA 290. No substitute definition provided.

Mental illness is defined in the jury instruction as "a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or the ability to cope with the ordinary demands of life." CJI2d 7.9(2). Mental retardation means "significantly subaverage general intellectual functioning which originates during the developmental period and is associated with impairment of adaptive behavior." CJI2d 7.9(3).

A person under the influence of drugs or alcohol that have been voluntarily consumed or injected at the time of the alleged offense shall not be deemed legally insane. MCL 768.21a(2).

6. Test

The test for insanity was set forth in *People v Martin*, 386 Mich 407, 418 (1971). There, the Michigan Supreme Court stated the salient elements for insanity:

> (1) whether defendant knew what he was doing was right or wrong; and,
>
> (2) if so, whether defendant had the power to resist doing the wrongful act.

This test encompasses not only a sudden overpowering impulse, but any situation in which the power to resist is insufficient to restrain commission of the wrongful act.

CJI2d 7.9(4) states:

> "To be legally insane, a person must first be either mentally ill or mentally retarded, as I have defined those conditions. But that is not enough. To be legally insane, the person must, because of [his/her] mental illness or mental retardation, lack substantial capacity either to appreciate the nature and quality or the wrongfulness of [his/her] conduct or to conform [his/her] conduct to the requirements of the law."

Although the "policeman at the elbow" standard alone does not accurately reflect whether the defendant lacked substantial capacity to conform his or her conduct to the requirements of the law, it is proper for the

prosecution to ask the defendant and/or the defendant's expert witness whether the defendant would have committed the act if a police officer was at his or her elbow in order to explore the extent of the defendant's control, and whether there was sufficient evidence to support the court's finding of sanity. *People v Jackson*, 245 Mich App 17, 23 (2001).

7. Psychiatrists and Privileged Communications

MCL 330.1750(2) provides that privileged communications shall not be disclosed in civil, criminal, legislative, or administrative cases or proceedings, or in proceedings preliminary to such cases or proceedings, unless the patient has waived the privilege, except in the circumstances set forth in this section.

MCL 330.1750(3) states that privileged communications shall be disclosed upon request:

> "(a) when the privileged communication is relevant to a matter under consideration in a proceeding governed by this act, but only if the patient was informed that any communications could be used in the proceeding;
>
> "(b) when the privileged communication is relevant to a matter under consideration in a proceeding to determine the legal competence of the patient or the patient's need for a guardian but only if the patient was informed that any communications made could be used in such a proceeding;
>
> "(c) when the privileged communication was made during an examination ordered by a court, prior to which the patient was informed that a communication made would not be privileged, but only with respect to the particular purpose for which the examination was ordered;
>
> "(d) when the privileged communication was made during treatment that the patient was ordered to undergo to render the patient competent to stand trial on a criminal charge, but only with respect to issues to be determined in proceedings concerned with the competence of the patient to stand trial."

8. Waiver of Privilege

"After claiming the defense of insanity and authorizing the release of medical information, defendant can no longer claim an intent to preserve the sanctity of the physician-patient privilege." *People v Sullivan*, 231 Mich App 510, 517 (1998). See also MCR 2.314(B).

C. Guilty but Mentally Ill

1. By Trier of Fact

Pursuant to MCL 768.36(1), if the defendant asserts a defense of insanity in compliance with MCL 768.20a, the defendant may be found "guilty but mentally ill." CJI2d 7.12 provides:

> "(2) To find the defendant guilty but mentally ill, you must find each of the following:
>
> "(3) First, the prosecutor has proven beyond a reasonable doubt that the defendant is guilty of a crime.
>
> "(4) Second, that the defendant has proven by a preponderance of the evidence that [he/she] was mentally ill, as I have defined that term for you, at the time of the crime.
>
> "(5) Third, that the defendant has not proven by a preponderance of the evidence that [he/she] lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of [his/her] conduct or to conform [his/her] conduct to the requirements of the law."

The purpose behind the creation of the guilty but mentally ill verdict was to limit the number of persons who were improperly being relieved of all criminal responsibility by way of the insanity verdict. *People v Stephan*, 241 Mich App 482, 491–492 (2000).

2. By Plea

Before accepting a plea of guilty but mentally ill, the court must comply with the requirements of MCR 6.302. See Section 4.34 for discussion of a defendant's plea of guilty but mentally ill.

D. Acquittal by Reason of Insanity

Pursuant to MCL 330.2050(1), the court shall immediately commit any person who is acquitted of a criminal charge by reason of insanity to the custody of the center for forensic psychiatry, for a period not to exceed 60 days. The court shall forward to the center a full report, in the form of a settled record, of the facts concerning the crime which the patient was found to have committed but of which he or she was acquitted by reason of insanity.

MCL 330.2050(2) further provides that within the 60-day period the center for forensic psychiatry shall file a report with the court, prosecuting attorney, and defense counsel. The report shall contain a summary of the crime which the patient committed but of which he or she was acquitted by reason of insanity

and an opinion as to whether the person meets the criteria of a person requiring treatment or for judicial admission as defined by MCL 330.1404 or MCL 330.1515, and the facts upon which the opinion is based.

After receipt of the report, the court may direct the prosecuting attorney to file a petition pursuant to MCL 330.1434 or MCL 330.1516 for an order of hospitalization or an order of admission to a facility with the probate court of the person's county of residence or of the county in which the criminal trial was held. MCL 330.2050(3).

4.30 Witnesses—Disclosure and Production

MCR 6.201 Discovery

MCR 6.416 Presentation of evidence

MCL 763.1 Rights of the accused; hearing by counsel, defense, confronting witnesses

MCL 767.29 Witness in criminal case; necessity of giving bail for appearance

MCL 767.35 Material witness in criminal case; danger of loss of testimony

MCL 767.40a List of witnesses and res gestae witnesses; duty to disclose names; request for location assistance; impeachment

MCL 767.91 Uniform Act to secure the attendance of witnesses from without a state in criminal proceedings; definitions

MCL 767.94a Material or information within possession or control of defendant or defense attorney; disclosure to prosecuting attorney

MCL 768.26 Evidence; use of former testimony; deposition for defendant

MCL 775.15 Accused unable to procure witness; subpoena, fees

CJI2d 5.12 Prosecutor's failure to produce witness

A. Res Gestae Witnesses List with Information

The prosecutor shall attach to the information a list of the witnesses who might be called and the res gestae witnesses. MCL 767.40a(1).

The failure to include the name of a witness on the statutory list is evaluated under a due diligence analysis. See *People v Baskin*, 145 Mich App 526, 534–535 (1985). MCL 767.40a imposes a continuing duty on the prosecutor and law enforcement officials to exercise due diligence in discovering the

identities of res gestae witnesses. See *People v Pearson*, 404 Mich 698, 714–715 (1979); *People v Gunnett*, 182 Mich App 61, 67–68 (1990); *People v DeMeyers,* 183 Mich App 286, 291 (1990); *People v Wolford*, 189 Mich App 478, 483–484 (1991). Once the court finds the prosecution failed to exercise due diligence, the defendant is presumed prejudiced until the contrary is established. *Pearson, supra,* 404 Mich at 725.

B. Witness List

MCL 767.40a requires the prosecutor to provide defense counsel with a list of the witnesses he or she intends to produce no less than 30 days before trial. After that, the prosecutor may add or delete witnesses for good cause shown or by stipulation. MCL 767.40a(4). MCL 767.94a(1)(a) provides that upon request the defendant or his or her attorney shall disclose the name and last known address of each witness the defendant intends to call at trial if they are not listed by the prosecuting attorney. The witnesses shall be disclosed not later than 10 days before trial or as directed by the court. MCL 767.94a(2). A witness who is not disclosed may not be offered except "for good cause shown." MCL 767.94a(3). MCR 6.201 supersedes MCL 767.94a, but contains similar provisions. Under both the statute and court rule, the court has discretion to permit late amendment of the witness list.

C. Late Endorsement of Witnesses

Ordinarily, a late endorsement of witnesses should be permitted and a continuance granted to a defendant to obviate any potential prejudice that might result.* *People v Harrison*, 44 Mich App 578, 586 (1973); *People v Meadows*, 80 Mich App 680, 690 (1977); *People v Umerska*, 94 Mich App 799, 804 (1980); *People v Powell*, 119 Mich App 47, 50–52 (1982) and *People v Lobaito*, 133 Mich App 547, 557–558 (1984).

*See Section 4.20 for more information on continuances.

D. Locating and Producing Witnesses

A prosecutor is required to use due diligence to produce witnesses named on the 30-day witness list, unless the prosecutor seeks to delete the witness under MCL 767.40a(4). *People v Wolford*, 189 Mich App 478, 484 (1991). Under the amended res gestae witness statute, MCL 767.40a, the prosecutor is required to provide reasonable assistance to a defendant in locating and serving a witness. MCL 767.40a(5); *People v O'Quinn*, 185 Mich App 40, 44–45 (1990).

MCL 767.40a does not impose an obligation on the prosecutor to discover and produce unknown witnesses, either by the exercise of due diligence or some lesser burden. The prosecutor's duty to produce res gestae witnesses has been replaced by an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on a defendant's request. *People v Burwick*, 450 Mich 281, 288–289 (1995). "Reasonable assistance" is a lesser

responsibility than "due diligence." *People v Long*, 246 Mich App 582, 586 (2001).

A prosecutor's obligation under MCL 767.40a(5) to reasonably assist a defendant in locating and serving a witness applies to accomplice witnesses. *People v Koonce*, 466 Mich 515, 521 (2002).

Where the prosecutor knows of a potential witness the test is whether it has made a "diligent, good-faith effort" to produce that witness. *People v Conner*, 182 Mich App 674, 681 (1990). Due diligence always requires that the prosecution take reasonable steps to locate res gestae witnesses. *People v Gunnett*, 182 Mich App 61, 67 (1990); *People v Cummings*, 171 Mich App 577, 585 (1988).

The amendments to MCL 767.40a do not eliminate the viability of CJI2d 5.12, the missing witness instruction. Although the amended version of the res gestae witness statute relieves the prosecution from any duty to name and produce at trial *all* res gestae witnesses, the statute still requires compliance with a defendant's reasonable requests for assistance in locating and producing witnesses. MCL 767.40a(5). The prosecution's failure to provide the defendant with reasonable assistance could constitute an occasion on which the missing witness instruction is appropriate. *People v Perez*, 469 Mich 415, 418–420 (2003).

The amended res gestae statute also requires the prosecution to provide a list of all witnesses it intends to call at trial not more than 30 days before trial. MCL 767.40a(3). Additions or deletions may be made to the list by leave of the court and for good cause shown or stipulation. MCL 767.40a(4). Failure to comply with the statutory requirements for changing the 30-day witness list could also merit the missing witness instruction. *Perez*, *supra* at 418–421. According to the Michigan Supreme Court, "There may be other occasions that warrant the jury instruction; in every instance, the propriety of reading CJI2d 5.12 will depend on the specific facts of that case." *Perez, supra* at 420–421.

E. Evidentiary Hearing

Where the prosecutor knows of a potential res gestae witness, he or she is required to make a "diligent, good-faith effort" to produce the witness. *People v Conner*, 182 Mich App 674, 681 (1990). See also *People v Cummings*, 171 Mich App 577, 585 (1988). Whether due diligence was exercised is a factual issue to be determined by consideration of the following factors:

- The court shall ascertain whether the claimed missing person is a res gestae witness;
- If so, the prosecutor shall produce the witness or explain why the witness cannot be produced and why the witness was not indorsed and produced at trial;

- If the witness is not produced, the court shall determine whether the prosecution was duly diligent in its attempts to produce the witness;
- If a lack of due diligence is found or if the witness is produced, the court shall ascertain whether the defendant has been prejudiced by the failure to produce the witness at trial;
- If the defendant is found to be prejudiced, the court shall fashion an appropriate remedy. *People v Pearson,* 404 Mich 698, 723 (1979).

Once the court finds the prosecution failed to exercise due diligence, the defendant is presumed prejudiced until the contrary is established. *Pearson, supra* at 725. The trial court's findings of fact will not be set aside unless clearly erroneous. *People v Gunnett*, 182 Mich App 61, 67 (1990); MCR 2.613(C).

F. Unavailable Witnesses

Prior testimony can be used if a witness becomes unavailable. MCL 768.26; MRE 804(a) and 804(b). However, prior testimonial evidence is admissible only if the defendant had an opportunity to cross-examine the witness. *Crawford v Washington*, 541 US ___; 124 S Ct 1354 (2004).

For a witness to be unavailable under MRE 804, the prosecutor must have made a diligent good-faith effort to locate the witness for trial. *People v Bean*, 457 Mich 677, 684 (1998).

G. Subpoena for Defense Witness

A fundamental element of due process is a defendant's right to present witnesses in his or her favor. *Washington v Texas*, 388 US 14, 19 (1967); US Const, Am VI; Const 1963, art 1, §20; MCL 763.1.

The defendant has the burden of showing that a witness' testimony will be material and favorable to the defense, that the defendant cannot safely proceed to trial without the testimony of the witness, and that the defendant does not have the funds necessary to pay for subpoenaing the witness. MCL 775.15.

Applications to summon witnesses at the state's expense are addressed to the sound discretion of the trial court. MCL 775.15; *People v Thomas*, 1 Mich App 118, 125 (1965).

Some statutes require the court to appoint persons to assist the defense.* See MCL 768.20a(3) (indigent defendant is entitled to an independent psychiatric evaluation when preparing an insanity defense), and MCL 775.19a (court must appoint foreign language interpreter).

*See Section 4.16 on court-appointed expert witnesses.

MCL 775.15 refers to "material witnesses in [the defendant's] favor within the jurisdiction of the court." To implement a defendant's constitutional and statutory rights to compulsory process when a material witness resides outside of the state, Michigan has adopted the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. *People v McFall*, 224 Mich App 403, 407–408 (1997); MCL 767.91 *et seq*. To properly invoke the procedures under the Act, a defendant must "(1) designate the proposed witness' location with a reasonable degree of certainty; (2) file a timely petition; and (3) make out a prima facie case that the witness' testimony is material." *McFall, supra*, 224 Mich App at 409.

H. Material Witnesses—Bond

If there is a danger of the loss of the testimony of a material witness, after a hearing, the court can require the witness to post a bond. MCL 767.35; MCL 765.29.

I. Handcuffs/Shackles

A witness may testify while handcuffed under the same circumstances that may justify handcuffing a defendant during his or her testimony. The handcuffing must be done to prevent the escape of the witness, to prevent the witness from injuring others in the courtroom, or to maintain an orderly trial. *People v Banks*, 249 Mich App 247, 261 (2002).

J. Accomplice Testimony

It is proper to issue a cautionary instruction to the jury when an accomplice is called to testify by the prosecution, the defense, or the court. *People v Heikkinen*, 250 Mich App 322, 334–337 (2002).

K. Standard of Review

"The decision of a trial court concerning the status of an alleged res gestae witness will not be overturned unless clearly erroneous." *People v Baskin*, 145 Mich App 526, 531 (1985). The trial court's decision whether to permit the late endorsement of witnesses is reviewed for an abuse of discretion. *People v Martin*, 44 Mich App 254, 256 (1972).

A trial court's decision to handcuff or shackle a witness is reviewed for an abuse of discretion. *Banks, supra*, 249 Mich App at 261.

Part IV—Pleas (MCR Subchapter 6.300)

4.31 Felony Plea Proceedings

MCR 6.302 Pleas of guilty and nolo contendere

MCL 768.35 Plea of guilty; investigation by judge, refusal to accept

A. Generally

It is the duty of the judge to be satisfied that a felony plea is made freely, with full knowledge of the nature of the accusation, and without undue influence. MCL 768.35. The plea must occur on the record after the defendant is sworn. The plea must be understanding, voluntary and accurate. MCR 6.302.

B. Plea Requirements*

*A checklist and script for conducting a felony plea proceeding may be found in the Appendix.

1. An Understanding Plea

For an understanding plea, the court must advise the defendant of the name of the offense, the maximum possible prison sentence (including any mandatory minimum sentence) for conviction of the offense, and the rights that will be given up (both at trial and on appeal) if the defendant's plea is accepted. MCR 6.302(B).

When a defendant pleads guilty to a crime, the Sixth Amendment does not require the trial court to elaborate on the defendant's rights beyond the court's obligation to inform the defendant of the nature of the charge, the right to counsel, and the possible penalty for conviction after the plea. *Iowa v Tovar*, 541 US 77 (2004).

A proposed amendment to MCR 6.302(B)(3) would permit the court to inform a defendant of these rights in writing; if adopted, MCR 6.302(B)(3) would require the court to affirm on the record that defendant read and understood the rights.

2. A Voluntary Plea

For a voluntary plea, the court must confirm the terms of any plea agreement and determine whether the defendant was promised anything beyond the plea agreement, whether the defendant was threatened, and whether the plea is the defendant's own choice. MCR 6.302(C).*

*See Section 4.36, below, for more information on sentence bargaining.

A plea agreement must be made in open court or in writing. *People v Mooradian*, 221 Mich App 316, 318–320 (1997). MCR 2.507(H).

The court may reject a plea agreement offered after a plea cutoff date. *People v Grove*, 455 Mich 439, 469 (1997).

3. An Accurate Plea

For an accurate plea, the court must ascertain that there is support for a finding of guilt. MCR 6.302(D).

The factual basis for the plea is satisfied where evidence supports the elements of either the charged offense or a lesser offense to which the plea is offered. *People v LaFey*, 182 Mich App 528, 532 (1990); MCR 6.302(D).

A defendant may invoke the privilege against self-incrimination at any point during the plea proceeding, but the privilege is waived if not asserted. *People v Watkins*, 468 Mich 233, 235 (2003).

4. Additional Inquiries

After questioning the defendant, the court is required to ask the attorneys whether there are any promises, threats or inducements other than those already disclosed on the record and whether the court has complied with MCR 6.302(B)–(D). MCR 6.302(E).

C. Use of Felony Pleas

As a general rule, "fundamental fairness requires that promises made during plea-bargaining and 'analogous contexts be respected' . . . . However, this rule has two conditions: '(1) the agent must be authorized to make the promise; and (2) the defendant must rely to his detriment on the promise.'" *People v Ryan*, 451 Mich 30, 41 (1996).

*See Chapter 2, Section 2.18 for more information.

MRE 410 addresses the inadmissibility of statements made during a plea and plea discussions. See *People v Dunn*, 446 Mich 409, 415–416 (1994). See also MRE 803(22).*

D. Remedy for a Defective Plea

When a motion to withdraw a plea is made after sentencing, the decision whether to grant the motion rests with the sound discretion of the court. *People v Effinger,* 212 Mich App 67, 69 (1995). MCR 6.310 and MCR 6.311 govern withdrawal of pleas.*

When a plea is taken and all of the required elements are not satisfied, the case should be remanded to allow the prosecutor to establish the missing elements. If the prosecutor is able to do so, the defendant's conviction should not be disturbed. However, if the prosecutor is unable to do so, the trial court must set aside the defendant's conviction. If there is conflicting evidence, the defendant shall be allowed to withdraw his plea and proceed to trial. *People v Mitchell*, 431 Mich 744, 750 (1988); *People v Kedo*, 108 Mich App 310, 314 (1981).

E. Standard of Review

A reviewing court may consult the whole record when considering the effect of any error on substantial rights when taking a plea. *United States v Vonn*, 535 US 55, 59 (2002). See also *People v Saffold*, 465 Mich 268, 271 (2001).

The entry of a valid guilty or nolo contendere plea constitutes a waiver of the right to appeal most issues, except for those which "would preclude the state from ever prosecuting the defendant for the crime regardless of his factual guilt." *People v New*, 427 Mich 482, 488 (1986). While the parties may agree to preserve an issue by entry of a conditional plea, the appeal of a conditional plea is by application only. MCR 6.301(C)(2).

The U.S. Sixth Circuit Court of Appeals has held that the federal constitution may require appointment of counsel to assist indigent defendants who wish to apply for leave to appeal, where Const 1963, art 1, § 20, as amended in 1994, provides that persons who plead guilty may appeal by leave of court, only, under most circumstances. *Tesmer v Granholm*, 333 F3d 683, 701 (CA 6, 2003), cert gtd *Kowalski v Tesmer*, ___ US ___ (2004).

4.32 Nolo Contendere (No Contest) Plea

MCR 6.301(B) Available pleas; court's consent required

MCR 6.302(D)(2) Accuracy of a nolo contendere plea

MCL 767.37 Indictee; plea on arraignment

A. Generally

A nolo contendere plea can be entered only with the consent of the court. MCR 6.301(B).

While not specifically covered by the rules, it may be appropriate to explain to the defendant what a no contest plea is.

B. Requirements of a Nolo Contendere Plea Proceeding*

*A checklist and script is included in the Appendix.

The court must state why a plea of nolo contendere is appropriate. MCR 6.302(D)(2)(a). The court should inquire of defense counsel why the plea is being offered and then announce the reason(s) the plea is appropriate. Appropriate reasons for a no contest plea include the defendant's lack of recall, intoxication at the time of the incident, the possibility of civil litigation, and the pendency of other proceedings where the defendant's position could be affected by an admission.

*See Section 4.13 for information on determining a defendant's competence.

If a no contest plea to a specific-intent crime is based on intoxication, the prosecution must offer evidence to refute an intoxication defense. *People v Polk*, 123 Mich App 737, 740 (1983). Also, special care must be taken if the defendant's competency is in question.* The court is required to hold a hearing and make a separate finding of competence at the time the plea is offered. *People v Matheson*, 70 Mich App 172, 179 (1976).

1. Support for Finding Guilt

The court is required to hold a hearing that establishes support for a finding that the defendant is guilty of the offense. MCR 6.302(D)(2)(b). The court rule does not define a procedure for the hearing. Typically it is handled by the parties stipulating to the court's use of the police report or preliminary examination transcript, since the defendant cannot be questioned about the occurrence. It may be a good practice to obtain the defendant's consent to the use of the record. The record utilized should be identified and the court should state the portions relied on for each element of the offense. See *People v Johnson*, 122 Mich App 26, 27–28 (1982).

As noted above, special care must be taken if intoxication is the reason for the no contest plea.

2. Effect on Sentence

Make sure the defendant understands that he or she will be sentenced in the same manner as if he or she had tendered a guilty plea. MCL 767.37.

3. Compliance with Court Rule

*See Section 4.31 for a discussion of these factors.

Once the court has determined that the no contest plea is understandingly, voluntarily and accurately made,* it must ask the prosecutor and the defense attorney whether it has complied with the court rule in making those determinations. MCR 6.302(E).

C. Use of a No Contest Plea

MRE 410 addresses the evidentiary use of a no contest plea. It provides, in part:

> "[E]vidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> * * *
>
> "(2) A plea of nolo contendere, except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense

against a claim asserted by the person who entered the plea;

"(3) Any statement made in the course of any proceedings under MCR 6.302 or comparable state or federal procedure regarding either of the foregoing pleas; or

"(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn."

D. Waiver of Issues on Appeal

The entry of a guilty or nolo contendere plea constitutes a waiver of the right to appeal most issues, except for those which "would preclude the state from ever prosecuting the defendant for the crime regardless of his factual guilt." *People v New,* 427 Mich 482, 488 (1986). While the parties may agree to preserve an issue by entry of a conditional plea, the appeal of a conditional plea is by application only. MCR 6.301(C)(2).

4.33 Plea of Not Guilty by Reason of Insanity—MCR 6.304

Pursuant to MCR 6.304(A), the court must comply with the requirements of MCR 6.302 (pleas of guilty and nolo contendere) before accepting a plea of not guilty by reason of insanity.* MCR 6.302(C), rather than MCR 6.302(D), governs the accuracy of the plea.

*See Section 4.29 for discussion of the insanity defense.

MCR 6.304(B) provides that the court must further advise the defendant and determine whether the defendant understands that the plea will result in the defendant's commitment for diagnostic examination at the center for forensic psychiatry for up to 60 days. After the exam, the probate court may order the defendant to be committed for an indefinite time.

MCL 768.20a(3) provides a defendant with the right to an independent psychiatric evaluation under certain circumstances. The trial court's ruling on whether to authorize an independent psychiatric evaluation is reviewed for an abuse of discretion. *People v Smith*, 103 Mich App 209, 210 (1981).

> "An indigent defendant in Michigan is also entitled to an independent psychiatric evaluation by a clinician of his choice. . . . [O]ther than psychiatric experts, a defendant is entitled to the appointment of an expert at public expense only if he cannot otherwise proceed safely to trial without the expert. In other words, a defendant must show a nexus between the facts of the case and the need for an expert [internal citations omitted]." *People v Leonard*, 224 Mich App 569, 582 (1997).

The court must also examine the psychiatric reports prepared and hold a hearing before accepting the plea. MCR 6.304(C). At the hearing it must be established that:

(1) the defendant committed the acts charged; and

(2) a reasonable doubt exists about the defendant's legal sanity at the time of the offense.

After the court has accepted the plea, the court must forward to the center for forensic psychiatry a full report, in the form of a settled record, of the facts concerning the crime to which the defendant pleaded and the defendant's mental state at the time of the crime. MCR 6.304(D).

4.34 Plea of Guilty but Mentally Ill—MCR 6.303

Before accepting a plea of guilty but mentally ill, the court must comply with the requirements of MCR 6.302. In addition to establishing a factual basis for the plea pursuant to MCR 6.302(D)(1) or MCR 6.302(D)(2)(b), the court must examine the psychiatric reports prepared and hold a hearing that establishes support for a finding that the defendant was mentally ill, but not insane, at the time of the offense to which the plea is entered. The reports must be made a part of the record.

The following statutory conditions must be met under MCL 768.36(2) before a guilty but mentally ill plea may be accepted:

(1) the defendant has asserted a defense of insanity;

(2) the defendant has waived a trial by jury or judge;

(3) the court has examined the reports on criminal responsibility prepared as a result of examinations required by the defendant's assertion of the defense;

(4) a hearing on the issue of defendant's mental illness has been conducted; and

(5) the court is satisfied that the defendant was mentally ill at the time of the offense.

These requirements are also incorporated in MCR 6.301(C)(1).

In *People v Booth*, 414 Mich 343, 355–358 (1982), the Court determined that the requirement that the trial court hold a hearing on the issue of defendant's mental illness was intended as an adjunct to the traditional plea procedure. Accordingly, it fashioned a procedure combining the court rule plea procedure relating to the issue of criminal liability and the statutory procedure relating to the issue of mental illness.

In summary, the court must comply with the requirements of the guilty plea rule, including the advice requirements and establishing a factual basis for the criminal liability either by direct questioning as provided in MCR 6.302(D)(1), or the nolo contendere procedure provided in MCR 6.302(D)(2)(b). Additionally, as to the issue of mental illness, the court must follow the statutory requirements of examining the psychiatric reports prepared and holding a hearing to establish that the defendant was mentally ill, but not insane, at the time of the offense.

A trial court has discretion whether to accept a defendant's guilty but mentally ill plea. *People v Blue*, 428 Mich 684, 694 (1987).

4.35 Withdrawal of a Guilty Plea

MCR 6.302(C) Voluntariness of guilty and nolo contendere pleas

MCR 6.310 Withdrawal or vacation of plea before acceptance or sentence

MCR 6.311 Challenging plea after sentence

MCR 6.312 Effect of plea withdrawal or vacation

A. Withdrawal of Plea Before Sentencing

There is no absolute right to withdraw a guilty plea once it has been accepted by the trial court. *People v Montrose (After Remand)*, 201 Mich App 378, 380 (1993).

In promulgating MCR 6.310, the Michigan Supreme Court adopted a more restrictive standard for considering a motion to withdraw a guilty plea, which considers the interest of justice and potential prejudice to the prosecution. *People v Holmes*, 181 Mich App 488, 497 (1989). Prior to this standard, when a motion to withdraw a guilty plea was made before sentencing, the court exercised its discretion with great liberality. *People v Bencheck*, 360 Mich 430, 432 (1960).

In *People v Strong,* 213 Mich App 107, 111 (1995), the Court of Appeals interpreted MCR 6.310 and concluded that a trial court may set aside an accepted plea only if:

> "(1) a motion to withdraw the plea is brought by the defendant; (2) the court on its own motion and with the consent of the defendant sets aside the plea; or (3) a motion to vacate the plea is brought by the prosecution on the ground that the defendant has violated the terms of the plea agreement."

A trial court may not sua sponte vacate an accepted plea without the defendant's consent, even if a defendant indicates he is innocent. *Strong*, *supra*, 213 Mich App at 112.

*See Section 4.36.

A sentencing judge who decides not to abide by the terms of a sentence agreement (*Cobbs* agreement) may not tell a criminal defendant what sentence might be imposed before the defendant decides whether to withdraw a guilty plea.* *People v Williams*, 464 Mich 174, 180 (2001).

The court may require an affidavit in support of a motion to withdraw a guilty plea. *People v Johnson*, 386 Mich 305, 314 (1971).

Doubt about the veracity of a defendant's nolo contendere plea, by itself, is not an appropriate reason to permit the defendant to withdraw an accepted plea before sentencing. *People v Patmore*, ___ Mich App ___ (2004). In *Patmore*, the defendant moved to withdraw his no contest plea on the basis that the complainant had recanted her preliminary examination testimony on which the defendant's plea was based.

Because no Michigan case law involved the circumstances presented in *Patmore* (recanted testimony in the context of a defendant's motion to withdraw a nolo contendere plea), the Court of Appeals noted that recanted testimony in the context of a defendant's motion for new trial is generally regarded with suspicion and considered untrustworthy. *Patmore, supra* at ___. In the context of a new trial, a defendant would be required to establish either the veracity of the witness' recanted testimony or the falsity of the witness' initial testimony. *Patmore, supra* at ___. The *Patmore* Court concluded that recanted testimony in both contexts—motions for new trial and motions to withdraw a plea—should be similarly viewed.

B. Burden

The court must find that withdrawal of a guilty plea is in the interest of justice and does not substantially prejudice the prosecutor's reliance on the plea. *People v Spencer*, 192 Mich App 146, 151 (1991). Where a defendant moves to withdraw the plea before sentencing, the burden is on the defendant to establish a fair and just reason for withdrawal of the plea; the burden then shifts to the prosecutor to establish that substantial prejudice would result if the defendant was allowed to withdraw the plea. *People v Jackson*, 203 Mich App 607, 611–612 (1994).

> "To constitute substantial prejudice, the prosecution must show that its ability to prosecute is somehow hampered by the delay. This would appear to require more than mere inconvenience in preparing for trial. Ultimately, the trial judge should bear in mind what is in the interests of justice in deciding if a plea may be withdrawn. Accordingly, what constitutes substantial prejudice may vary from case to case." *Spencer, supra*, 192 Mich App at 151.

In *Spencer*, the trial court had a duty to allow the defendant to withdraw his plea since it may have been induced by inaccurate legal advice, and the defendant refused or was unable to recount a sufficient basis to substantiate the charges against him. *Spencer*, *supra* at 151.

C. Withdrawal of Plea After Sentencing

MCR 6.311(A)* and MCR 7.103(B)(6) provide a six-month post-sentencing window for motions to withdraw a plea.

*Among other changes, proposed amendments to the court rules would consolidate the content of MCR 6.311 into MCR 6.310.

To prevail on a motion to withdraw a plea after the court imposes sentence, the defendant's motion, supporting affidavits, and proofs must satisfy the trial court, by a preponderance of credible evidence, that the plea was caused by fraud, duress, or coercion. *People v Sledge*, 198 Mich App 218, 220 (1993), citing *People v Taylor*, 383 Mich 338, 361 (1970).

The court will consider making exception to the formal motion requirements of MCR 6.311(A) and MCR 6.311(C) only when there are other errors that require a retrial of the underlying offenses. Absent other errors, the court will strictly follow MCR 6.311(C), which requires that a motion for plea withdrawal be made in the trial court to preserve the issue for appeal.

MCR 6.311(C) states:

> "(C) Preservation of Issues. A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter, or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal."

In *People v Gaines*, 198 Mich App 130, 131 (1993), the defendant's challenge to the validity of his habitual-offender plea was not properly before the appellate court because the defendant did not move to withdraw his plea at the trial court level.

D. Motion to Withdraw Based on Ineffective Assistance of Counsel

A trial court erred when it allowed the defendant to withdraw his plea after he learned that his plea would make him subject to deportation under federal immigration law, because the immigration and deportation consequences of the plea are collateral matters. Failure of counsel to advise the defendant of the consequences did not deny the defendant the effective assistance of counsel.* *People v Davidovich*, 463 Mich 446, 453 (2000).

*See Section 4.46 for more information on ineffective assistance of counsel.

The test is whether the attorney's assistance enabled the defendant to make an informed and voluntary choice between going to trial and entering a guilty plea. Absent unusual circumstances, where counsel has adequately apprised a defendant of the nature of the charges and the consequences of a plea, the defendant can make an informed and voluntary choice whether to plead guilty or go to trial without a specific recommendation from counsel. *People v Corteway*, 212 Mich App 442, 446 (1995).

A plea effects a waiver of the right to invoke appellate review of those defects relating solely to the capacity of the state to prove the defendant's factual guilt, including a motion to suppress evidence. *People v Stammer*, 179 Mich App 432, 439 (1989). See also *People v New*, 427 Mich 482, 488–491 (1986); *People v Sells*, 164 Mich App 219, 221–222 (1987).

E. Vacating a Guilty Plea

When a defendant withdraws his guilty plea, he or she reopens the matter to any of the charges that had been brought or could have been brought against the defendant at the time his or her guilty plea was entered. MCR 6.312; *People v Johnson*, 197 Mich App 362, 364 (1992).

F. Inadmissibility of Withdrawn Plea

Ordinarily, evidence of a withdrawn plea and statements made during the plea proceedings are not admissible in any civil or criminal proceedings. MRE 410.* See *People v Dunn*, 446 Mich 409, 415–416 (1994).

*See Chapter 2, Section 2.18 for more information.

G. Appealing a Guilty Plea

Michigan law does not provide an appeal of right to defendants convicted by plea. Appeal from a plea-based conviction is by application for leave to appeal. MCL 770.3(1)(d). See also MCR 6.302(B)(5)–(6) and proposed amendments to MCR 6.302(B). Coupled with MCL 770.3a(1), a statute that—with certain specific exceptions—expressly denies the appointment of appellate counsel to defendants convicted on the basis of guilty pleas, indigent defendants are frequently unable to obtain the assistance of counsel to pursue discretionary appeals. The Michigan Supreme Court approved of these statutory provisions in *People v Bulger*, 462 Mich 495, 499, 504 (2000), when the Court ruled that the state constitution did not require that an indigent defendant be appointed counsel to pursue a discretionary appeal. However, the United States Court of Appeals for the Sixth Circuit has concluded that portions of MCL 770.3a are unconstitutional:

> "Michigan's statute creates . . . a different opportunity for access to the appellate system based upon indigency. As applied, the statute violates the due process provision of the Fourteenth Amendment to the United States Constitution, and is thus

unconstitutional." *Tesmer v Granholm*, 333 F3d 683, 701 (CA 6, 2003), cert gtd *Kowalski v Tesmer*, ___ US ___ (2004).

H. Standard of Review

A trial court's decision whether to grant a motion to withdraw a plea is reviewed for an abuse of discretion. *People v Wilhite*, 240 Mich App 587, 594 (2000); *People v Effinger*, 212 Mich App 67, 69 (1995); *People v Montrose (After Remand)*, 201 Mich App 378, 380 (1993).

If there is no record of the trial court proceedings, as when the court does not comment on the defendant's allegations, and the appellate court has no basis for reviewing the trial court's discretion, the case must be remanded for an evidentiary hearing. *Sledge*, *supra,* 198 Mich App at 220, citing *People v Johnson*, 386 Mich 305, 314 (1971).

4.36 Sentence Bargaining

A. Sentence Agreements and Recommendations

A prosecutor and a defendant may reach a sentence agreement whereby the defendant agrees to plead guilty in exchange for a specific sentence disposition. The extent to which a trial court may involve itself in sentence negotiations is defined by the Michigan Supreme Court's decisions in *People v Killebrew*, 416 Mich 189 (1982), and *People v Cobbs*, 443 Mich 276 (1993).

Sentence Recommendation Under *Killebrew*. *Killebrew* limits a trial court's involvement to the approval or disapproval of a non-binding prosecutorial sentence recommendation linked to a defendant's guilty plea. *Killebrew, supra* at 209. Under *Killebrew*, a trial court may accept a defendant's guilty plea without being bound by any agreement between the defendant and the prosecution. *Id*. Where a trial court has decided not to adhere to the sentence recommendation accompanying the defendant's plea agreement, the court must explain to the defendant that it has decided not to accept the prosecutorial recommendation *and* the court must advise the defendant of the sentence it has determined is appropriate to the circumstances of the offense and the offender. *Killebrew*, *supra* at 209; *People v Scott*, 197 Mich App 28, 32 (1992).

Following the court's rejection of the prosecutorial recommendation and its announcement of the intended sentence, the defendant must be given the opportunity to affirm or withdraw his or her guilty plea based on the court's expressed disposition. *Killebrew, supra* at 210; *Scott, supra* at 32. See also *People v Shuler*, 188 Mich App 548, 551–552 (1991) (where the sentencing court expressly informed the defendant that it would exceed the sentence recommended by the prosecutor, named the specific sentence it intended to

impose, and permitted the defendant to withdraw or affirm his guilty plea in light of the court's announcement).

Cobbs Plea. The Court's decision in *Cobbs* involved its review of a trial court's participation in sentence negotiations in the absence of an existing or proposed agreement between the defendant and the prosecution. *Cobbs, supra* at 282–284. *Cobbs* authorizes the trial court to make a preliminary evaluation of the sentence appropriate to the offense and the offender if requested by either party. The prosecution or the defendant may ask the court to indicate on the record the length of imprisonment that appears appropriate for the charged offense, based on the information then available to the court. *Cobbs*, *supra* at 283. Even when a defendant pleads guilty or no contest to the charged offense in reliance on the court's preliminary determination regarding the defendant's likely sentence—a *Cobbs* agreement—the court retains discretion over the actual sentence imposed should additional information dictate the imposition of a longer sentence. *Id*. If the court determines it will exceed its previously stated sentence, the defendant has an absolute right to withdraw the plea. *Id*.

In *People v Williams*, 464 Mich 174 (2001), the Michigan Supreme Court distinguished between a trial court's role in sentence negotiations occurring under *Killebrew* and those occurring under *Cobbs*. According to the *Williams* Court, *Cobbs* modified *Killebrew* "to allow somewhat greater participation by the judge." *Williams, supra* at 177. However, the *Williams* Court ruled that the requirement of *Killebrew*—that a court must indicate the sentence it considers appropriate if the court decides against accepting the prosecutorial recommendation—does not apply to a *Cobbs* agreement later rejected by the court that made the preliminary evaluation. *Williams, supra* at 178–179. The Court explained the distinction between *Cobbs* and *Killebrew* as preserving the trial court's impartiality in sentence negotiations by minimizing the potential coercive effect of a court's participation in the process:

> "In cases involving sentence recommendations under *Killebrew*, the neutrality of the judge is maintained because the recommendation is entirely the product of an agreement between the prosecutor and the defendant. The judge's announcement that the recommendation will not be followed, and of the specific sentence that will be imposed if the defendant chooses to let the plea stand, is the first involvement of the court, and does not constitute bargaining with the defendant, since the judge makes that announcement and determination of the sentence on the judge's own initiative after reviewing the presentence report.
>
> "By contrast, the degree of the judge's participation in a *Cobbs* plea is considerably greater, with the judge having made the initial assessment at the request of one of the parties, and with the defendant having made the decision to offer the plea in light of that assessment. In those circumstances, when the judge makes the determination that the sentence will not be in accord with the earlier assessment, to have the judge then specify a new sentence,

which the defendant may accept or not, goes too far in involving the judge in the bargaining process. Instead, when the judge determines that sentencing cannot be in accord with the previous assessment, that puts the previous understanding to an end, and the defendant must choose to allow the plea to stand or not without benefit of any agreement regarding the sentence.

"Thus, we hold that in informing a defendant that the sentence will not be in accordance with the *Cobbs* agreement, the trial judge is not to specify the actual sentence that would be imposed if the plea is allowed to stand." *Williams*, *supra* at 179–180.

B. Violations of a Sentence Agreement or Recommendation

1. By Prosecutor

In *People v Nixten*, 183 Mich App 95 (1990), the defendant pled guilty in exchange for a reduction in the charged offense and a promise that "the People will recommend that the minimum sentence in this case not exceed eight years." Rather than honor its promise to make a general sentence recommendation, the prosecution recommended a specific minimum sentence of 7 years, 11 months, 28 days. The court concluded that the prosecutor's action unnecessarily restricted the court's discretion and left unfulfilled the prosecutor's assurance of leniency. The sentencing agreement was breached. The court held that specific performance was the appropriate remedy because defendant was not asserting his innocence and merely complaining that the prosecutor did not keep its part of the bargain. The case was remanded for resentencing before a different judge. *Nixten, supra* at 97–99.

2. By Defendant

MCR 6.310(C) states that "on the prosecutor's motion, the court may vacate a plea before sentence is imposed if the defendant has failed to comply with the terms of the plea agreement."

If there is a genuine dispute as to whether the defendant breached the bargain, due process provides the right to a hearing. *United States v Ataya*, 864 F2d 1324, 1330 (CA 7, 1988). The prosecutor has the burden of proving a defendant's breach by a preponderance of the evidence. *United States v Croswell*, 997 F2d 146, 148 (CA 6, 1993).

In *People v Garvin*, 159 Mich App 38 (1987), the defendant pled guilty, but escaped from custody four days later and was sentenced four years later. The defendant attempted to withdraw his plea stating that the sentence he received was longer than the sentence stated in the plea agreement. The court denied the defendant's motion to withdraw his guilty plea and stated that the agreement went "out the window" when defendant escaped. *Garvin, supra* at 42. The Court of Appeals agreed finding that the defendant implicitly waived his right to withdraw the

guilty plea when he escaped. The sentencing recommendation contemplated that no intervening factors would occur between the plea and the sentencing, and the defendant waived his right to withdraw his guilty plea when he escaped.

> "[The] defendant's failure to 'live up to his part of the bargain' did not void the guilty plea. Rather it waived his right to withdraw the plea because the sentence recommendation was not followed. However, the reasoning of *Acosta* supports the proposition that a defendant must abide by the contemplated terms of a plea agreement in order to seek enforcement of the agreement." *Garvin*, *supra* at 44.

In *People v Acosta*, 143 Mich App 95, 99 (1985), remanded 425 Mich 883 (1986), the defendant failed to appear to enter his guilty plea and was arrested eight months later. The court declined to enforce the original plea agreement finding that the prosecutor was not bound by the agreement until the defendant entered and completed his plea.

In *People v Kean*, 204 Mich App 533, 535–536 (1994), the Court of Appeals reached a conclusion similar to that in *Garvin*. In *Kean*, the prosecutor agreed to recommend a sentence of five to twenty years if the defendant pleaded guilty to armed robbery. As part of the agreement, the defendant promised that "within twenty-four hours from the date of the taking of the plea defendant will be in a twenty-four hour in-house drug alcohol residential treatment center or he will report to the Kalamazoo County Sheriff's Department." The defendant pled guilty and entered a qualifying program. However, one week later he walked away from the program and was arrested more than two years later. *Kean*, *supra* at 535.

The trial court found that defendant was not entitled to enforce the plea agreement because he violated it by leaving the program. The Court of Appeals found the facts were sufficiently similar to *Garvin* to uphold the trial court's denial of the defendant's motion to withdraw his plea. As in *Garvin*, *supra*, the "sentencing recommendation contemplated that no intervening factors would occur between the plea and the sentencing." *Kean*, *supra* at 536, quoting *Garvin*, *supra* at 43.

3. By the Court

If the court receives information that in its judgment dictates a lower sentence than that included in a sentence agreement, it must allow the prosecutor the opportunity to withdraw from the agreement. *People v Seibert*, 450 Mich 500, 511 (1995). If the court chooses not to follow the specific sentence disposition or recommendation agreed upon, the defendant must be allowed the opportunity to withdraw from the plea agreement. MCR 6.302(C)(3), *Killebrew*, *supra* at 208–210.

C. Enforcing a Sentence Agreement

As a general rule, fundamental fairness requires that promises made during plea-bargaining be respected. *People v Ryan*, 451 Mich 30, 41 (1996). There are two conditions to this general rule: (1) the agent must be authorized to enter into the agreement; and (2) the defendant must rely on the promise to his or her detriment. *Id*.

The Supreme Court rejected the notion that a plea agreement can be specifically enforced as a remedy for breach. *People v Gallego*, 430 Mich 443, 450–452 (1988). The Court based its decision to deny specific performance in *Gallego* on the fact that the police lacked the authority to make a binding promise of immunity or not to prosecute. *Id.* at 452. Suppression is an appropriate and available alternative remedy, which restores the defendant to the position he enjoyed prior to making the agreement in question. *Id*. Enforcing an unauthorized promise made to defendant would undermine the accountability built into the prosecutorial function. *Id*. The court is not required to place defendant in a better position than he enjoyed prior to the agreement just because of police error. *Id*. at 457.

A defendant may be able to enforce an agreement to dismiss a case based on the results of a polygraph examination.* See *People v Reagan*, 395 Mich 306 (1975).

*See Chapter 2, Section 2.21 for more information on polygraph examinations.

Because restitution is mandated by the constitution, it is not a factor in a defendant's plea agreement or sentence bargaining. *People v Ronowski*, 222 Mich App 58, 61 (1997).

D. Standard of Review

The trial court's finding of breach is reviewed for clear error, and even when the court finds a breach, the trial court may have discretion to affirm the plea. *People v Hannold*, 217 Mich App 382, 388 (1996).

4.37 Plea—Collateral Attack of Earlier Plea or Conviction

A. Federal Law

In 1994, the United States Supreme Court sharply curtailed a defendant's right to collaterally challenge the constitutionality of prior state convictions used to enhance a federal sentence under the Armed Career Criminal Statute, 18 USC § 924 (e). In *Custis v United States*, 511 US 485, 497 (1994), the Court considered whether a defendant should face an enhanced sentence under the Armed Career Criminal Act. In a 6 to 3 decision written by Chief Justice Rehnquist, the majority held that the only collateral challenge permitted at the federal sentencing hearing would be to convictions obtained without the benefit of counsel in the absence of a valid waiver of representation. The

majority based its decision on the absence of congressional intent to permit such challenges, judicial economy, and an interest in protecting the finality of state court guilty-plea judgments. The opinion suggested that defendants could pursue their collateral challenges under either state post-conviction or federal habeas corpus statutes, and if successful, seek resentencing.

B. Michigan Law

It is also becoming more and more difficult for defendants to collaterally attack prior pleas or convictions for purposes of sentencing enhancement under Michigan law. See *People v Davidovich*, 463 Mich 446, 449–454 (2000).

In *People v Ingram*, 439 Mich 288, 296 (1992), the Michigan Supreme Court adopted Justice Brickley's concurring opinion in *People v Crawford*, 417 Mich 607 (1983). According to *Ingram*, a defendant has the right to collaterally attack prior convictions obtained in violation of his or her right to counsel. This rule, however, leaves open the possibility of collateral challenges to the knowing and voluntary character of such convictions. *Ingram*, *supra* at 295 n 6.

Before *Ingram*, a prior felony plea-based conviction could be collaterally challenged on the basis of *Boykin/Jaworski* violations. *Boykin v Alabama,* 395 US 238, 242–244 (1969); *People v Jaworski,* 387 Mich 21, 29–30 (1972). That is, the defendant could challenge a prior plea-based conviction if the sentencing court failed to inform the defendant of his or her right to remain silent, to cross-examine witnesses against the defendant, and to be tried by a jury.

According to Justice Brickley, the denial of the right to counsel mandated by *Gideon v Wainwright*, 372 US 335 (1963),

> "is a deprivation of rights altogether different from the issues before us here. The denial of the right to counsel impugns the integrity of the conviction, raising doubts about the guilt of the accused. It is for that reason, and that reason only, that the use of a counselless conviction is forbidden in collateral proceedings notwithstanding that the defendant did not raise the issue on direct review. The requirement of a record waiver of the right to remain silent, to cross-examine witnesses against him, and to be tried by a jury which is required by *Boykin-Jaworski*, while undoubtedly important, pales beside the right to counsel.
>
> "The United States Supreme Court has never forbidden the use of *Boykin*-violative convictions in state recidivist proceedings. A majority of this Court does so today because *Boykin* rights are of constitutional stature. Such reasoning begs the question. The right to be free from unreasonable searches, the right to effective assistance of counsel, the right to a properly instructed jury, and

countless other rights are also of a constitutional nature. Are we now to assume that all violations of constitutional rights not raised during direct review of a conviction may now be reviewed during habitual offender proceedings? I agree with Justice Stevens, writing for a unanimous Supreme Court in *United States v Timmreck*, 441 US 780, 784; 99 S Ct 2085; 60 L Ed 2d 634 (1979) (failure to advise defendant of a special parole term as required by F R Crim P 11 cannot be raised collaterally) when he states:

> 'For the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas.
>
> 'Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice.'" *Ingram*, *supra* at 296–297, quoting *Crawford*, *supra* at 615–616.

A defendant cannot plead guilty to a charged offense and then collaterally challenge the prior convictions on which the charged offense was based. *People v Rosenberry*, 465 Mich 713, 716 (2002).

C. Uncontested Prior Convictions

Prior convictions, where the record indicates that there was no counsel or formal waiver of counsel (when a right to counsel existed), may not be used to enhance punishment in a subsequent proceeding. *People v Garvie*, 148 Mich App 444, 453 (1986); *People v Schneider*, 132 Mich App 214, 216 (1984).

However, in *Nichols v United States*, 511 US 738 (1994), the United States Supreme Court held that the use of counselless misdemeanor convictions, where no prison term was imposed, to enhance the prison term for a subsequent offense was consistent with the Sixth and Fourteenth Amendments. The Court's rationale was that reliance on such convictions is consistent with the traditional understanding of the sentencing process, which is less exacting than the process of establishing guilt. *Nichols*, *supra* at 747.

Following the analysis in *Nichols, supra,* the Michigan Supreme Court has held that a prior plea-based misdemeanor conviction, obtained without benefit of counsel but for which no incarceration was imposed, may be used in a subsequent criminal prosecution for purposes of sentence augmentation. *People v Reichenbach*, 459 Mich 109, 120 (1998).

D. Expunged Juvenile Records

In *People v Smith*, 437 Mich 293, 304 (1991), the Michigan Supreme Court held that an expunged juvenile record may be considered at sentencing. This rationale comes from *People v McFarlin*, 389 Mich 557, 574–575 (1973):

> "[S]entencing should be tailored to the particular circumstances of the case and the offender in an effort to balance both society's need for protection and its interest in maximizing the offender's rehabilitative potential. A judge needs complete information to set a proper individualized sentence. A defendant's juvenile court history may reveal a pattern of lawbreaking and his response to previous rehabilitative efforts. This, together with information concerning underlying social or family difficulties, and a host of other facts are essential to an informed sentencing decision, especially if the offender is a young adult."

The Court in *Smith*, *supra* at 304, stated that in light of the Court's recent expression in *McFarlin*, it is clear that the Court did not mean or intend that the expunged record could not be considered in sentencing the offender as an adult.

In *People v Carpentier*, 446 Mich 19, 31 (1994), the Supreme Court held that where a defendant collaterally challenges prior juvenile adjudications used for purposes of recidivist sentencing and the relevant juvenile records have been properly expunged, the defendant bears the initial burden of establishing by prima facie proof that the adjudications were procured without counsel or without the proper waiver of counsel or that a request for such proof was refused by the sentencing court or the court failed to reply to the request. See also *People v Love*, 214 Mich App 296, 299 (1995); *People v Haywood*, 209 Mich App 217, 231 (1995); *People v Alexander (After Remand)*, 207 Mich App 227, 230 (1994).

Part V—Trials (MCR Subchapter 6.400)

4.38 Jury Trial

US Const, Am VI

Const 1963, art 1, §§ 14 & 20

MCR 6.401 Right to jury trial or bench trial

MCR 6.402 Waiver of jury trial

MCR 6.412 Selection of the jury

MCL 600.1307a Qualifications of juror; exemption; effect of payment for jury service; "felony" defined

MCL 763.2 Conviction; bases

MCL 768.8–768.18 Jury; trial of issues of fact, empaneling, waiver; challenges for cause; peremptory challenges; number of jurors; oath or affirmation

A. Generally

In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury. MCL 763.2; US Const, Am IV; Const 1963, art 1, §§ 14 & 20. The right to a public trial is not absolute, however, and may be modified to accommodate other interests such as the safety of witnesses, court personnel, and public spectators. *People v Kline*, 197 Mich App 165 (1992).

A defendant may, with the consent of the prosecutor and the approval of the court, elect to be tried before the court without a jury. MCL 763.3. The jury waiver process is addressed by MCR 6.401 and MCR 6.402.*

*See Section 4.40 for detailed information on bench trials.

B. Selection and Composition of Jury Panel

A defendant is entitled to an impartial jury. US Const, Am VI; Const 1963, art 1, § 20. The process whereby potential jurors are selected and brought to court is governed by MCL 600.1301 *et seq*. Generally, the process should be random and result in potential juries that reflect a cross-section of the community. MCR 2.511(A); *People v Green (On Remand),* 241 Mich App 40, 47–48 (2000).

Defendant is entitled to a jury which contains a representative cross-section of the community. *Taylor v Louisiana,* 419 US 522, 528 (1975). In order to establish a prima facie violation of the fair cross-section requirement, defendant must prove: "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to systematic exclusion of the group in the jury-selection process." *Duren v Missouri,* 439 US 357, 364 (1979). *People v Guy*, 121 Mich App 592, 599-600 (1982). See also *Castaneda v Partida,* 430 US 482 (1977); *People v Smith,* 463 Mich 199 (2000); *People v Hubbard (After Remand),* 217 Mich App 459, 463-483 (1996); and *People v Williams,* 174 Mich App 132, 137 (1987).

The first prong requires a showing of the exclusion of a constitutionally cognizable group. *Hubbard, supra* at 473. The second prong requires a showing that the number of members of the cognizable group is not fair and

reasonable in relation to the number of members of the relevant community. *Id.* at 473-474. The U.S. Supreme Court has not specified a preferred method of measuring under-representation. *Smith, supra* at 203. The lower federal courts have applied three different methods known as the absolute disparity test, the comparative disparity test and the standard deviation test. *Id.* The court in *Smith* indicated that all three approaches should be considered with no individual method used exclusive of the others. *Id.* at 204. The third prong requires a showing that the under-representation of the cognizable group is systematic, meaning resulting from some circumstances inherent in the particular selection process rather than a showing of one or two incidences of disproportionate panels. *Hubbard, supra* at 481.

1. Number of Jurors

The number of jurors is set by the Constitution (Const 1963, art 1, § 20), by statute (MCL 768.14 and MCL 768.18), and by court rule (MCR 6.410(A)). MCL 768.18 authorizes a trial judge in a felony case to impanel a jury of not more than 14 members. By agreement, a jury of less than 12 can be utilized. MCR 6.410(A). *People v Champion,* 442 Mich 873 (1993). See also *People v Godbold*, 230 Mich App 508, 512 (1998).

2. Identity of Jurors

The attorneys must be given a reasonable opportunity to examine the jurors' questionnaires before being called on to challenge for cause. MCR 2.510(C)(2). An "attorney's right to see the juror questionnaire ends when the trial ends." After the trial a court order following a motion is required. *Collier v Westland Arena,* 183 Mich App 251, 254 (1990).

The press has a qualified right of post-verdict access to juror names and addresses, subject to the court's discretion to consider jurors' concerns about safety and privacy. Access can be denied if the court determines the jurors' safety concerns are legitimate and reasonable. *In re Jurors' Names,* 233 Mich App 604, 630 (1999).

C. Voir Dire

MCR 6.412(C) Voir dire of prospective jurors

Voir dire is the process by which litigants may question prospective jurors so that challenges may be intelligently exercised. *People v Harrell*, 398 Mich 384, 388 (1976). The court has broad discretion to limit or preclude voir dire by the attorneys. MCR 6.412(C) provides:

> "(1) Scope and Purpose. The scope of voir dire examination of prospective jurors is within the discretion of the court. It should be conducted for the purposes of discovering grounds for challenges for cause and of gaining knowledge to facilitate an intelligent exercise of peremptory challenges. The court should confine the

examination to these purposes and prevent abuse of the examination process.

"(2) Conduct of the Examination. The court may conduct the examination of prospective jurors* or permit the lawyers to do so. If the court conducts the examination, it may permit the lawyers to supplement the examination by direct questioning or by submitting questions for the court to ask. On its own initiative or on the motion of a party, the court may provide for a prospective juror or jurors to be questioned out of the presence of the other jurors."

*A checklist of questions the court may wish to ask prospective jurors is included in the Appendix.

A trial court's discretion over the voir dire process is not unlimited. For example, a trial court may not restrict the scope of voir dire to the degree that the parties are unable to develop a factual basis for the intelligent exercise of their peremptory challenges. *People v Tyburski,* 196 Mich App 576, 581 (1992), aff'd 445 Mich 606 (1994). In *Tyburski*, the defendant was denied a fair trial because the trial court "fail[ed] to conduct a sufficiently probing voir dire in order to uncover potential juror bias." *Tyburski, supra*, 445 Mich at 609.

A trial court may refuse to ask prospective jurors specific questions submitted by counsel as long as the voir dire conducted by the court is sufficient to seat an impartial jury. *People v Sawyer,* 215 Mich App 183, 191 (1996). The court's voir dire procedure must include questioning a panel equal in size to the jury that will hear the case and an opportunity to examine replacement jurors before exercising further challenges. MCR 2.511(F); *People v Colon,* 233 Mich App 295, 303 (1999).

When information potentially affecting a juror's ability to act impartially is discovered after the jury has been sworn and the juror is allowed to remain on the jury, the defendant is entitled to relief on appeal if the defendant can establish either (1) that the juror's presence on the jury resulted in actual prejudice, (2) that the defendant could have successfully challenged the juror for cause, or (3) that the defendant would have "otherwise dismissed" the juror by exercising a peremptory challenge had the information been revealed before trial. *People v Daoust,* 228 Mich App 1, 7–8 (1998). See also *People v Manser,* 250 Mich App 21, 28 (2002) (the defendant was entitled to a new trial where the evidence established that a juror would have been excused for cause if the juror had disclosed certain information during voir dire).

Access to juror personal history questionnaires is governed by MCR 2.510(C)(2)(b) and the court's local administrative order. Juror qualifications questionnaires are confidential. MCL 600.1315.

1. Challenges for Cause

MCR 6.412(D) Challenges for cause

MCL 768.10 Challenge to juror for cause; effect of opinion or impression not positive in character, declaration by juror

Jurors are presumed to be qualified, competent, and impartial. *People v Walker,* 162 Mich App 60, 63 (1987). The burden of proving the existence of a disqualification is on the party alleging it. *People v Collins,* 166 Mich 4, 9 (1911).

To qualify as a juror, an individual must "not have been convicted of a felony." MCL 600.1307a(1)(e); MCR 2.511(D)(2).

Generally, a juror must be excused when challenged for cause on the grounds enumerated in MCR 2.511(D). *Walker, supra*, 162 Mich App at 64; *Poet v Traverse City Osteopathic Hosp,* 433 Mich 228, 251-252 (1989). In any event, a defendant is not entitled to relief where even if the trial court erred in denying the defendant's challenge to a prospective juror for cause, the defendant failed to exhaust his or her peremptory challenges. *People v Legrone,* 205 Mich App 77, 81–82 (1994).

But see *People v Roupe,* 150 Mich App 469, 474 (1986), where the Court concluded a juror should have been excused for racial bias, and the trial court's failure to do so was an abuse of discretion, and *People v Williams,* 241 Mich App 519, 521–522 (2000), where the trial court properly excused a prospective juror for bias when the juror indicated he could not convict the defendant on the basis of a paid informant's testimony.

2. Peremptory Challenges

MCR 6.412(E) Peremptory challenges

MCL 768.12 Peremptory challenge; offense not punishable by death or life imprisonment; number

MCL 768.13 Peremptory challenge; offense punishable by death or life imprisonment; number

In a criminal case where the offense is not punishable by life imprisonment, a defendant is entitled to five peremptory challenges. MCR 6.412(E)(1). If the offense charged is punishable by life imprisonment, the defendant is entitled to 12 peremptory challenges. *Id*. The prosecutor is entitled to the same number of peremptory challenges as is the defendant. *Id*. If two or more criminal defendants are tried jointly, see MCR 6.412(E)(1) to determine the number of peremptory challenges. See also *People v Paasche*, 207 Mich App 698, 701 (1994). On a showing of good cause, the court has discretion to grant additional peremptory challenges in a criminal case. MCR 6.412(E)(2); *People v Howard,* 226 Mich App 528, 536 (1997).

There is no constitutional right to exercise peremptory challenges. A defendant is not denied an impartial jury simply because he cannot make the most effective use of his peremptory challenges. *People v Daoust,* 228

Mich App 1, 7 (1998). However, the court cannot preclude the exercise of a peremptory challenge against a juror already "passed" by the party. *People v Schmitz,* 231 Mich App 521, 528–530 (1998). The attorneys do not have unrestricted discretion in exercising peremptory challenges and peremptory challenges may not be utilized to exclude jurors on the basis of race or sex. *Batson v Kentucky,* 476 US 79, 89 (1986); *Powers v Ohio,* 499 US 400, 415 (1991); *Edmonson v Leesville Concrete Co,* 500 US 614, 628–629 (1991); *Georgia v McCollum,* 505 US 42, 59 (1992); *J.E.B. v Alabama,* 511 US 127, 140–143 (1994).

Analysis of a *Batson* challenge uses a three-step process. First, the party opposing the strike must make a prima facie case of racial discrimination based on more than the minority status of the juror. Second, if a prima facie case of discrimination is made, the burden shifts to the striking party to provide a race-neutral reason for the strike. The reason does not have to be persuasive or even plausible. Unless discriminatory intent is evident in the explanation, it is deemed race-neutral. Third, if a race-neutral explanation is provided, the court must then decide whether the opponent of the strike has proved purposeful racial discrimination. At this stage, the persuasiveness of the explanation becomes relevant. *Purkett v Elem,* 514 US 765, 767 (1995); *Harville v State Plumbing and Heating,* 218 Mich App 302, 319–320 (1996); *Clarke v KMart Corp,* 220 Mich App 381, 384 (1996).

A court may sua sponte raise a *Batson* issue. *People v Bell (On Reconsideration)*, 259 Mich App 583, 589 (2003). A showing of prejudice is not required when there has been a *Batson* violation. *Bell, supra* at 597.

D. Alternate Jurors and Removal or Substitution of a Juror at Trial

The court may direct that more than 12 jurors be impaneled. MCR 6.411. If more jurors than needed to decide the case remain on the panel when deliberations are set to begin, the names of all the jurors must be placed in a container and names drawn to reduce the number of jurors to the number required. MCR 6.411.

Alternate jurors may be retained during the jury panel's deliberations. If the court decides to retain the alternate jurors, it must advise the alternate jurors not to discuss the case with any person until the jury completes its deliberations and is discharged. MCR 6.411.

The court has the discretion to remove a juror during trial for possible bias. *People v Mason,* 96 Mich App 47, 49–50 (1980).

With the defendant's consent a trial court may excuse a juror who developed a medical condition after deliberations had begun and replace that juror with a dismissed alternate juror who had not acquired any extraneous information about the case. The judge must instruct the reconstituted jury to begin

deliberations anew. *People v Tate,* 244 Mich App 553, 566–567 (2001); MCR 6.411.

E. Substitution of Judges

When judges are substituted after voir dire, a defendant must show actual prejudice to justify reversal. *Brown v Swartz Creek VFW,* 214 Mich App 15, 21 (1995).

F. Sequestration

Except in extreme cases, whether to sequester a jury is discretionary. MCL 768.16; *People v Haggart,* 142 Mich App 330, 337 (1985); CJI2d 2.15; *Sheppard v Maxwell,* 384 US 333, 362–363 (1966).

G. Anonymity

In *People v Williams,* 241 Mich App 519, 523 (2000), the parties referred to the jurors by number rather than name throughout the selection process. Biographical information was not withheld from the parties and nothing in the record indicates that the use of numbers undermined the presumption of innocence. There was no indication that the jurors thought the use of numbers rather than names was out of the ordinary. The Court of Appeals concluded that

> "under the facts of this case, defendant's due process rights were not violated by using juror numbers instead of names at trial. However, we caution the trial courts about the potential for prejudice arising from the use of anonymous juries. The procedure should be employed only when jurors' safety or freedom from undue harassment is, in fact, an issue, and, when used, appropriate safeguards should be carefully followed to assure a fair trial." *Williams, supra*, 241 Mich App at 525.

H. View

MCR 6.414(D) Conduct of jury trial

MCL 768.28 Evidence; view by jury

MCL 768.28 provides that the court may order a view by the jury "whenever such court shall deem such view necessary." MCR 6.414(D) provides that "[t]he court may order a jury view of property or of a place where a material event occurred." Generally, the court should consider whether a jury view serves some useful purpose or is reasonably certain to aid the jury on a material issue.

The parties are entitled to be present at a jury view. MCR 6.414(D). No one may speak during the view other than the officer designated by the court. *Id*. Whether to permit a jury view of the place where the crime occurred is left to the discretion of the court. *People v Greeson,* 230 Mich 124, 142 (1925). See also *People v Mallory,* 421 Mich 229, 245 (1984); *People v King,* 210 Mich App 425, 432 (1995).

I. Standard of Review

A trial court's decision to remove a juror is reviewed for an abuse of discretion. *People v Tate*, 244 Mich App 553, 559 (2001); *People v Mason,* 96 Mich App 47, 49–59 (1980).

Whether minorities have been systematically excluded from a jury venire and other alleged violations of the jury selection process are reviewed de novo. *People v Schmitz,* 231 Mich App 521, 528 (1998); *People v Hubbard (After Remand),* 217 Mich App 459, 472 (1996). A *Batson* ruling is reviewed for an abuse of discretion. *People v Howard,* 226 Mich App 528, 534 (1997).

A judge's decision on the scope of voir dire is reviewed for an abuse of discretion. *White v City of Vassar,* 157 Mich App 282, 289 (1987).

A judge's decision on whether to conduct a midtrial voir dire is reviewed for abuse of discretion. *People v Washington,* 251 Mich App 520, 529 (2002).

A trial court's ruling on a challenge for cause is reviewed for an abuse of discretion. *Poet v Traverse City Osteopathic Hosp,* 433 Mich 228, 236 (1989).

4.39 Jury Waiver

MCR 6.401 Right to trial by jury or court

MCR 6.402 Waiver of jury trial

MCL 763.3 Waiver of trial by jury; form, time

A. Requirements

A defendant's waiver of the right to a jury trial requires the consent of the prosecutor and the court's approval. MCL 763.3; MCR 6.401; MCR 6.402. Before accepting a defendant's waiver, the defendant must have been arraigned (or have waived arraignment) and properly advised of the right to a jury trial. MCR 6.402 requires the court to make a verbatim record of the following:

- Advise the defendant of the constitutional right to a jury trial.

- Address the defendant personally to determine whether the defendant understands his or her right to have a jury trial.
- Determine whether the defendant has consulted with an attorney or has had an opportunity to consult with an attorney.
- Address the defendant personally to determine that the defendant is voluntarily giving up the right to a jury trial and opting to be tried by the court.
  - Ask the defendant if anyone promised him or her anything to waive a jury trial.
  - Ask the defendant if anyone threatened him or her with anything to waive a jury trial.
  - Ask the defendant if it is his or her free choice to waive the right to a jury trial.

According to the statute, except in cases of minor offenses, a defendant's waiver of a jury trial and his or her election to be tried by the court should be in writing, signed by the defendant, filed in the case, and made part of the record. MCL 763.3(2); MCL 763.3(1) provides the language for this written waiver:

> "I, [name of defendant], defendant in the above case, hereby voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a judge of the court in which the case may be pending. I fully understand that under the laws of this state I have a constitutional right to a trial by jury."

The court rule governing a defendant's waiver of a jury trial does not require the defendant to sign a written waiver form. Even in the absence of a written waiver form, the court is required to make a verbatim record of the waiver proceeding showing that the defendant knew of the right, the defendant's waiver of the right was voluntary, and the defendant was offered an opportunity to consult with counsel. MCR 6.402(A) and (B).

B. Make a Record of any Prior Involvement

When a defendant opts for a bench trial, the trial judge should make a record of the court's prior involvement with the case and consider reassignment if the court is too familiar with the file. See MCR 2.003. Consider obtaining express approval of parties to proceed if the court has had prior involvement. The case should be reassigned if the court has significant information regarding the case which would not be in evidence during the trial, such as defendant's failure of a lie detector test. See *People v Dixson*, 403 Mich 106, 108–109 (1978); *People v McLeod*, 107 Mich App 710, 714 (1981); *People v Hale*, 72 Mich App 484, 486 (1976); *People v Lobsinger,* 64 Mich App 284, 290–291 (1975).

C. Prospect of Leniency if Defendant Waives a Jury Trial

It is unethical to give a defendant a "waiver break" in exchange for waiving his or her right to a jury trial. *People v Ellis*, 468 Mich 25, 27–28 (2003).

The defendant's waiver was not "coerced" where the defendant waived his right to a jury trial based on defense counsel's advice that if he waived a jury trial, he would receive a sentence concession. *People v Godbold,* 230 Mich App 508, 513–514 (1998).

D. Standard of Review

The trial court's determination that a defendant validly waived his or her right to a jury trial is reviewed for clear error. *People v Leonard*, 224 Mich App 569, 595 (1997).

4.40 Bench Trial

MCR 6.403 Trial by the judge in waiver cases

MCL 600.2101 Cases tried without a jury; objections to testimony, exclusion from record; appeal

MCL 768.29 Duty of judge at trial; effect of failure to instruct

A. Disqualification

Where, during the codefendant's bench trial, the trial judge expressed his belief that the defendant committed the offense, that judge should have disqualified himself from subsequently hearing the defendant's case. *People v Gibson (On Remand)*, 90 Mich App 792, 797–798 (1979). A judge may consider disqualification when the judge has heard the factual basis for an aborted guilty plea. *People v Cocuzza*, 413 Mich 78, 79 (1982). A judge is not automatically disqualified from hearing a defendant's second bench trial after a reversal on appeal. *People v Upshaw*, 172 Mich App 386, 388–389 (1988).

B. Record of Rulings on Pretrial Motions

Unless required to do so by a different court rule, the trial court is not required to explain its reasoning and state its findings of fact on pretrial motions, but doing so is helpful for appellate review. MCR 2.517(A)(4); *People v Shields*, 200 Mich App 554, 558 (1993).

C. Evidentiary Issues in a Bench Trial

Generally, during a bench trial the court should consider only the evidence set forth in the record and should not rely on its own specialized knowledge in reaching a verdict. *People v Simon*, 189 Mich App 565, 567–568 (1991). It is reversible error for the trial judge during a bench trial to refer to the preliminary examination transcript except as provided by MCL 768.26 (authorizes use of a preliminary examination transcript when a witness is unavailable at trial). *People v Ramsey*, 385 Mich 221, 225 (1971). It is also reversible error for the trial judge to view the premises without giving counsel and the parties an opportunity to be present. *People v Eglar*, 19 Mich App 563, 565 (1969).

D. Decisions

MCR 2.517(A)(1) requires that, in all actions tried without a jury or with an advisory jury, "the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." A court's decision should include "[b]rief, definite, and pertinent findings and conclusions on the contested matters . . . without overelaboration of detail or particularization of facts." MCR 2.517(A)(2). The requirement that a trial judge articulate the reasons for a decision in its factual findings applies to criminal cases as well as civil cases. *People v Jackson*, 390 Mich 621, 627 (1973). A trial court's articulation of the law it applied to the facts of the case is designed to aid appellate review. *People v Johnson (On Rehearing),* 208 Mich App 137, 141 (1994). Findings are sufficient if it appears that the court was aware of the issues and correctly applied the law. *People v Smith,* 211 Mich App 233, 235 (1995).

If the findings of fact do not comply with the court rule, the appellate court will generally remand the case to the trial court. However, occasionally appellate courts will not remand for a full fact-finding even if the fact-finding is inadequate as long as the record is clear regarding the trial court's finding on each element of the offense charged. *People v Davis*, 126 Mich App 66, 70 (1983). The narrow exception to remand for additional fact-finding applies only to the trial court's resolution of credibility issues and conflicts within the evidence. *Id*. at 70. See also *Jackson*, *supra*, 390 Mich at 627 n 3 (remand unnecessary "where it [wa]s manifest that [the trial judge] was aware of the factual issue, that [the judge] resolved it and it would not facilitate appellate review to require further explication of the path [the judge] followed in reaching the result[.]")

A trial judge sitting as the trier of fact may not enter an inconsistent verdict. *People v Vaughn*, 409 Mich 463, 466 (1980); *People v Walker,* 461 Mich 908 (1999).

When rendering a decision after a bench trial, the author recommends that the judge cover the following:*

*A checklist in contained in the Appendix.

- Applicable statutes, if any;
- Applicable jury instructions (including elements of the offense in a criminal case);
- Burden of proof;
- Any presumptions that may apply;
- Findings of facts sufficient to show an appellate court that the trial judge was aware of the issues and correctly applied the appropriate law;
- Conclusions of law; and
- Direct entry of the appropriate judgment.

E. Standard of Review

A trial court's findings of fact are reviewed for clear error. MCR 2.613(C). "In application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Id*.

When reviewing a challenge to the sufficiency of the evidence in a bench trial, the evidence presented is viewed in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. The trier of fact may make reasonable inferences from evidence in the record but may not make inferences completely unsupported by any direct or circumstantial evidence. *People v Petrella,* 424 Mich 221, 268–270, 275 (1985); *People v Vaughn,* 186 Mich App 376, 379–380 (1990).

4.41 Confrontation

US Const, Am VI

Const 1963, art 1, § 20

MCL 763.1 Rights of accused; hearing by counsel, defense, confronting witnesses

A. Defendant's Right of Confrontation

1. Generally

A criminal defendant has the right to be confronted by the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20; MCL 763.1. A defendant's right to confrontation is guaranteed through the right of cross-

examination, the oath taken by witnesses, and the defendant's ability to observe a witness' demeanor while testifying. *People v Lawson*, 124 Mich App 371, 374 (1983). The protections of the Confrontation Clause extend to pretrial hearings. See *People v Levine*, 231 Mich App 213, 219–223 (1998), vacated on other grounds 461 Mich 172 (1999). The Confrontation Clause guarantees only that a defendant has the opportunity for effective cross-examination; a defendant is not guaranteed an ideal cross-examination. A defendant's right to confrontation is satisfied when he or she has the opportunity to explore matters like the witness' bad eyesight, bias, and poor memory. *People v Chavies*, 234 Mich App 274, 283 (1999).

2. Scope

*See Section 4.27, for information on the Rape Shield Statute.

The right of the accused to confront witnesses is a crucial element of the process and serves to protect the defendant's right to a fair trial. US Const, Am VI; Const 1963, art 1, § 20. However, the right to confront witnesses is not absolute and may succumb to other compelling interests.* *People v Kasben*, 158 Mich App 252, 255 (1987). See also *People v Kent*, 157 Mich App 780, 786 (1987).

A compelling interest is present when the state is protecting victims of sexual assault. *Kasben*, *supra*, 158 Mich App at 254. This is particularly relevant when the victim is a minor. It is not a violation of defendant's Sixth Amendment right for a court to refuse to allow questioning regarding a victim's previous sexual conduct. *People v Arenda*, 416 Mich 1, 13 (1982).

See MCL 600.1436 (a witness may not be deemed incompetent due to his or her opinions about religion and may not be questioned about those opinions before or after he or she is sworn).

3. Defendant's Conduct

*See Section 4.43, below, for more information.

The Sixth Amendment Confrontation Clause guarantees the right of the defendant to be present at trial. *Illinois v Allen*, 397 US 337, 338 (1970). However, as with the compelling interests present in sexual assault cases, the right to confrontation may succumb to a defendant's prior conduct. When the conduct of the defendant disrupts the administration of justice the court has the authority to examine the circumstances of the case and take appropriate action regarding a disruptive defendant.* A defendant may be removed from the courtroom to ensure that the trial process is conducted in a dignified manner. *People v Staffney*, 187 Mich App 660, 664 (1990). Ordinarily, before the defendant is removed from the courtroom the defendant must be warned. *People v Gross*, 118 Mich App 161, 164 (1982). A defendant may be removed without a warning when his or her behavior is aggressive and violent. *Staffney*, *supra* at 665.

4. Unavailable Witnesses

Crawford v Washington, 541 US ___ (2004), overruled in part *Ohio v Roberts*, 448 US 56 (1980), which permitted admission of an unavailable witness' statement against a criminal defendant if the statement bore "adequate indicia of reliability" and fell within either a "firmly rooted hearsay exception" or "b[ore] particularized guarantees of trustworthiness." The *Crawford* Court held that the Confrontation Clause bars the admission of testimonial statements of a witness who is unavailable to testify unless the defendant had a prior opportunity for cross-examination. The Court left "for another day any effort to spell out a comprehensive definition of 'testimonial,'" but observed that whatever else is covered, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, at a former trial, and during police interrogations.

An unavailable witness' former testimonial statement may be admitted to impeach a witness without violating the Confrontation Clause according to *Crawford*. *People v McPherson*, 263 Mich App 124, 134 (2004). See also *People v Geno*, 261 Mich App 624, 630–631 (2004).

5. Codefendant or Co-Conspirator Testimony

The admission of prior testimonial statements violates a defendant's constitutional right to confrontation unless the prior statements were subject to cross-examination by the defendant and the person who made the statements is unavailable to testify. *Crawford v Washington*, 541 US 36, 52–53 (2004).

A defendant's Sixth Amendment right to confrontation is violated when the confession of a codefendant* implicating the defendant is placed before the jury at the defendants' joint trial when the confessing codefendant did not testify at trial and was not subject to cross-examination. *Bruton v United States*, 391 US 123, 126 (1968).

*See Chapter 2, Section 2.41 for detailed discussion of this topic.

The Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession if the confession is redacted to eliminate the defendant's name and other references to the defendant. *Richardson v Marsh*, 481 US 200, 208–209 (1987). However, merely redacting the codefendant's name and replacing it with a blank, the term "deleted", or some other symbol still points too directly at a jointly tried codefendant and violates the Confrontation Clause. *Gray v Maryland*, 523 US 185, 192 (1998).

B. Special Arrangements to Accommodate Compelling Interests

A defendant can be denied the right to face-to-face confrontation when the court permits a child witness to testify against the defendant outside the defendant's presence. The right to face-to-face confrontation may be denied

to further public policy when the reliability of the testimony is assured. A closed-circuit television is an appropriate mode of communication in this instance, *Staffney*, *supra*, 187 Mich App at 665, or when the witness is mentally and psychologically challenged and the assault was of an extreme nature. *People v Burton*, 219 Mich App 278, 288–289 (1996).

Proposed amendments to the court rules governing criminal procedure would create a new rule, MCR 6.006, which would specifically govern video proceedings in criminal cases.

C. Standard of Review

Whether a defendant has been denied his or her right to confrontation is a constitutional question reviewed de novo on appeal. *People v Beasley*, 239 Mich App 548, 557 (2000).

A trial court's findings of fact regarding the trustworthiness of a hearsay statement are reviewed for clear error. *People v Barrera*, 451 Mich 261, 268–269 (1996).

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575 (2001).

4.42 Questions or Comments by Judge

MRE 614 Calling and interrogation of witnesses by court

CJI2d 3.5(6) Composite jury instructions; evidence

A trial court is vested with broad discretion over the administration of trial proceedings. *People v Taylor*, 252 Mich App 519, 522 (2002). See also MCL 768.29; MCR 6.414(A); and MRE 611(a).

> "A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct. A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *People v Paquette,* 214 Mich App 336, 340 (1995).
>
> "When a case is tried before a jury, the judge must take care that his questions and comments do not indicate partiality. *People v Jackson,* 98 Mich App 735, 740 (1980). A new trial will be ordered where such comments quite possibly could have influenced the jury to the detriment of defendant's case. *People v Smith,* 64 Mich App 263, 267 (1975)." *People v Pointer,* 133 Mich App 313, 316–317 (1984).

Judicial questioning which creates a suspicion as to the witness' credibility is discouraged. *People v Sterling,* 154 Mich App 223, 228 (1986). It is improper for a trial judge to belittle, scold, or demean a defendant's attorney to the extent that the jury might regard the attorney with contempt. *People v Ross,* 181 Mich App 89, 91 (1989).

Examples of objectionable conduct by the trial court include volunteering information not in evidence, "campaigning from the bench," and interrupting or making derogatory remarks toward counsel. *People v Conyers,* 194 Mich App 395, 405–406 (1992).

4.43 Defendant's Conduct and Appearance at Trial

US Const, Am VI

Const 1963, art 1, § 20

MCL 768.3 Presence at trial of person indicted

A. Presumption of Innocence

1. Clothing

A defendant is to be presumed innocent. The defendant's right to a fair and impartial trial generally requires that the defendant not appear before the jury in jail clothes. The presumption of innocence would be prejudiced if the defendant was forced to appear before a jury in jail garb. *People v Daniels*, 163 Mich App 703, 710 (1987). The defendant's request to appear in civilian clothes must be granted when it is made in a timely manner before trial. *People v Harris*, 201 Mich App 147, 151 (1993). This general rule does not apply to bench trials where an absence of prejudice is presumed. *Daniels*, *supra,* 163 Mich App at 710.

A defendant's right to appear in civilian clothes is not absolute and may be denied if the request is untimely. The request should be made before the jury has been impaneled so that the jury has not had occasion to see the defendant in prison attire. *People v Turner*, 144 Mich App 107, 109 (1985). See also *People v Harris*, 80 Mich App 228, 230–231 (1977). It is reversible error and an abuse of the court's discretionary power when the court fails to explain the reasoning behind the decision to deny the defendant's motion. *Turner*, *supra,* 144 Mich App at 110–112.

2. Handcuffs/Shackles

In order to protect the defendant's presumption of innocence and ensure a fair trial, it is the preferred practice to have the defendant appear before the court without handcuffs. *People v Wells*, 103 Mich App 455, 459 (1981). However, handcuffs may be permitted when necessary to prevent

the escape of the defendant, ensure the safety of those involved in the trial, or to maintain order in the courtroom. *People v Duplissey*, 380 Mich 100, 103–104 (1968); *People v Williams*, 173 Mich App 312, 314 (1988). It is also appropriate to examine the defendant's background in order to evaluate the court's necessity to shackle the defendant. *Williams, supra,* 173 Mich App at 315.

A decision to restrain a defendant may be based on information from the Department of Corrections or a county jail. *People v Dixon*, 217 Mich App 400, 405 (1996). If restraints are used in the jury's presence, the court may want to consider a cautionary instruction that the restraints are not evidence and should not be considered as evidence. A decision to restrain a defendant is reviewed for an abuse of discretion under the totality of the circumstances. *Dixon*, *supra*, 217 Mich App at 404–405; *Williams*, *supra,* 173 Mich App at 314–315. Absent a showing of prejudice, an appellate court will not reverse a conviction simply because the jury happened to see the defendant in handcuffs. *Wells*, *supra,* 103 Mich App at 460.

The court may also face the question of whether it is proper to handcuff or otherwise restrain witnesses. In *People v Banks*, 249 Mich App 247, 256–258 (2002), the Court of Appeals held that the trial court abused its discretion to control trial proceedings and infringed on the defendant's right to a fair trial by ordering an alibi witness to be handcuffed without facts on the record to support the need to restrain the witness.

3. Gagging

When a defendant is uncooperative and "insist[s] upon shouting obscenities," it may be necessary to gag the defendant. Gagging should only be used as a last resort to ensure the defendant's cooperation and maintain an appropriate courtroom atmosphere. *People v Kerridge*, 20 Mich App 184, 188 (1969).

B. Right of Confrontation and Right to Be Present*

*See Section 4.41 on confrontation.

1. Disruptive Conduct of Defendant

A defendant has the constitutional right to be present at his or her trial. US Const, Am VI; *Illinois v Allen*, 397 US 337, 338 (1970). Michigan law requires that a defendant charged with a felony be present at his or her trial. MCL 768.3. The right to confrontation is not absolute. When the conduct of the defendant disrupts the administration of justice the court has the authority to examine the circumstances of the case and take appropriate action regarding a disruptive defendant.

2. Defendant Leaves During Trial

A defendant's voluntary departure from the courtroom after trial has begun may waive the defendant's right to be present and may not preclude the trial judge from proceeding with the trial. *People v Swan*, 394 Mich

451, 452 (1975). However, a defendant's failure to appear for trial may not waive his or her right to be present. See *People v Woods*, 172 Mich App 476, 479 (1988).

C. Testimony

1. Medication

The defendant may have the right to be taken off antipsychotic drugs before testifying unless the court finds that the defendant presents a risk to self or others. See *People v Posby*, 227 Mich App 219, 227–232 (1997), vacated by 459 Mich 21 (1998) (Court of Appeals ruled that the trial court erred in denying the defendant's request to be taken off his medication three days before testifying so that his mental state at trial more closely matched his mental state at the time of the crime; the defendant died before the Michigan Supreme Court could review the prosecution's appeal of that decision).

2. Refusal to Answer Questions

The court may strike all or part of a witness' testimony if the witness refuses to permit meaningful cross-examination. See *People v Holguin*, 141 Mich App 268, 272–273 (1985).

D. Self-Incrimination—Requiring Defendant to Display Body or Perform Act

It is not a violation of the Fifth Amendment to require a defendant to do any of the following:*

*See Chapter 2, Section 2.31 on self-incrimination, and see Section 4.12 on identification.

- Display to the jury an arm tattoo. *United States v Alpern*, 564 F2d 755, 762 (CA 7, 1977) and *United States v Bay*, 762 F2d 1314, 1315–1317 (CA 9, 1984).
- Shave a beard. *United States v Lamb*, 575 F2d 1310, 1316 (CA 10, 1978) and *United States v Valenzuela*, 722 F2d 1431, 1433 (CA 9, 1983).
- Don an article of clothing. *United States v Satterfield*, 572 F2d 687, 690 (CA 9, 1978); and *United States v Lamb*, 575 F2d 1310, 1316 (CA 10, 1978).
- Give voice samples. *United States v Terry,* 702 F2d 299, 316 (CA 2, 1983) and *United States v Williams*, 704 F2d 315, 317–320 (CA 6, 1983).
- Give handwriting samples. *United States v Pheaster*, 544 F2d 353, 371–372 (CA 9, 1976); and *United States v Campbell*, 732 F2d 1017, 1020–1021 (CA 1, 1984) (however, it is a violation of the privilege to require defendant to write words dictated to him or her because that

requires defendant in effect to say "This is the way I spell these words.").

- Stand for purposes of identification. *United States v Wilson*, 719 F2d 1491, 1496 (CA 10, 1983).
- Remove a pair of glasses. *United States v Wilson*, 719 F2d 1491, 1496 (CA 10, 1983).
- Expose his or her teeth and gums to be viewed by a witness. *United States v Maceo*, 873 F2d 1, 4–6 (CA 1, 1989).
- Utter certain phrases so that the jury can compare the defendant's voice with the voice on a tape of a drug transaction. *United States v Leone*, 823 F2d 246, 249–250 (CA 8, 1987).

4.44 Evidence of Defendant's Conduct

CJI 2d 4.4 Flight, Concealment, Escape or Attempted Escape

The Michigan Court of Appeals has consistently held that actions by the defendant such as flight to avoid lawful arrest, procuring perjured testimony and attempts to destroy evidence, while possibly as consistent with innocence as with guilt, may be considered by the jury as evidence of guilt. *People v Lytal*, 119 Mich App 562, 575 (1982); *People v Ranes*, 63 Mich App 498, 500 (1975); *People v Hooper*, 50 Mich App 186, 199 (1973); *People v Casper*, 25 Mich App 1, 7 (1970).

A. Threats by Defendant

A defendant's threat against a witness is generally admissible. It is conduct that can demonstrate consciousness of guilt. *People v Sholl*, 453 Mich 730, 740 (1996).

B. False Exculpatory Statement

A defendant's exculpatory statements may be used as circumstantial evidence of guilt when the statements are false. *People v Wackerle*, 156 Mich App 717, 720 (1986); *People v Dandron*, 70 Mich App 439, 442 (1976).

C. Flight By Defendant

The case law suggests that a defendant's flight from custody is admissible, not as substantive proof of guilt, but to show the defendant's state of mind. Even then the cases suggest an instruction on the topic is not always appropriate, recognizing flight can result from reasons other than guilt. Evidence of flight should be admitted with caution where its probative value is slight in light of

the other evidence presented in the case. *People v Clark*, 124 Mich App 410, 413–414 (1983).

In appropriate circumstances, Michigan permits an instruction to the jury on flight, CJI2d 4.4. An excellent review of the appropriateness of such an instruction is found in *People v Cutchall*, 200 Mich App 396 (1993). Also worth reviewing is *People v Taylor*, 195 Mich App 57, 63–64 (1992).

The court should also be careful to distinguish the admissibility of evidence of flight from the question of whether the jury instruction should be given. Arguably, there may be situations where the evidence is admitted, but the instruction should not be given.

4.45 Stipulations, Statements, and Arguments

MCR 2.507(H) Conduct of trial; agreements to be in writing

MCR 6.414(B) Conduct of trial; opening statements

MCR 6.414(E) Closing arguments

A. Stipulations

Where the defendant offered to stipulate to his prior convictions to prevent detailed testimony of those offenses from being admitted against him at trial, the trial court's denial of the offer was error requiring reversal because the testimony constituted improper use of 404(b) evidence. *People v Crawford*, 458 Mich 376, 381 n 3, 395–400 (1998).

Notwithstanding a defendant's offer to stipulate to any elements of the crime charged, the prosecution retains the burden of proving each element beyond a reasonable doubt. *People v Mills*, 450 Mich 61, 69–70 (1995). Evidence may be properly admitted on an undisputed point—one to which the defendant has stipulated—if the evidence is necessary to "illustrate[] the nature and extent of the [victim's] injuries." *Mills, supra*, 450 Mich at 70 n 5, 71.

B. Opening Statement

Opening statements* serve to introduce the case to the jury. The opening statement is a requirement of the prosecutor unless otherwise waived by the court and opposing counsel. MCR 6.414(B). See also *People v Stimage*, 202 Mich App 28, 31 (1993). The purpose is to inform the jury of the nature of questions involved and other information that will familiarize the jury with the case. An opening statement is the appropriate time to state the facts to be proven at trial. *People v Nard,* 78 Mich App 365, 374–375 (1977).

*See Section 4.45 for more information about a prosecutor's comments.

MCR 6.414(B) states:

> "Opening Statements. Unless the parties and the court agree otherwise, the prosecutor, before presenting evidence, must make a full and fair statement of the prosecutor's case and the facts the prosecutor intends to prove. Immediately thereafter, or immediately before presenting evidence, the defendant may make a like statement. The court may impose reasonable limits on the opening statements."

In the absence of bad faith, it is not error when the prosecutor fails to prove the assertions made during opening statements. *People v Coward*, 32 Mich App 274, 276 (1971). It is appropriate during the opening statement to state principles of law that are applicable to the facts. If a party misstates a principle of law, the error may often be corrected by the court's instructions to the jury. *Jones v Taxicab & Transfer Co*, 218 Mich 673, 677 (1922). The criteria to determine what is a fair opening statement is left largely to the discretion of the court. *Taylor v Klahm*, 40 Mich App 255, 261 (1972).

1. Prejudicial or Inflammatory Remarks

The opening statement shall not contain prejudicial or inflammatory remarks. It is improper for counsel to describe the testimony of a witness and then later fail to have the witness testify. Similarly the prosecutor may not describe exhibits if they are not established evidence. Although a duty of the prosecutor is to paint a vivid picture of the crime to the jury, the prosecutor may not improperly appeal to the jurors' sympathy while describing the situation. Such prejudicial statements serve to violate the defendant's right to a fair trial. *People v Vaughn*, 128 Mich App 270, 272–273 (1983).

The ultimate determination of whether the prosecutor engaged in improper conduct depends on whether the prosecutor's conduct, taken in context, deprived the defendant of a fair and impartial trial. *People v McLaughlin*, 258 Mich App 635, 644–645 (2003); *People v Watson*, 245 Mich App 572, 586 (2001).

2. Dismissal or Mistrial

A judge may dismiss the action against a defendant after the prosecutor's opening statement. The case may be dismissed if following the opening statement the judge declares that even if the prosecutor proved all the facts intended there would be no basis to convict. This practice is discouraged and should only be used after careful judicial consideration. *People v Recorder's Ct Judge*, 78 Mich App 576, 578–579 (1977).

Informing a jury during opening statement of a defendant's blood alcohol level can result in a mistrial when the results are not admitted into evidence at trial. *People v Wolverton*, 227 Mich App 72, 75–78 (1997).

C. Closing Argument

MCR 6.414(E) provides:

> "Closing Arguments. After the close of all the evidence, the parties may make closing arguments. The prosecutor is entitled to make the first closing argument. If the defendant makes an argument, the prosecutor may offer a rebuttal limited to the issues raised in the defendant's argument. The court may impose reasonable limits on the closing arguments."

1. Permissible Content of Closing Argument

A prosecutor's closing argument may argue the evidence admitted at trial and include any reasonable inferences from that evidence. *People v Kelly*, 231 Mich App 627, 641 (1998). The prosecutor may not submit issues which are beyond the scope of guilt or innocence nor may the prosecutor make predictions on the consequences of the jury's verdict. *People v Biondo*, 76 Mich App 155, 158 (1977). However, during rebuttal the prosecutor is allowed to examine issues raised in the defendant's argument. MCR 6.414(E). See also MCR 2.507(E). Rebuttal arguments must be limited to the issues raised by the defendant's closing argument and may not go back to arguments that the prosecutor made in his or her initial closing argument. MCR 6.414(E).

The prosecutor has a wider degree of latitude during closing arguments. Character attributes of the defendant may be inferred from evidence presented. The prosecutor can evaluate the personality, truthfulness and integrity of witnesses. *People v Couch*, 49 Mich App 69, 73 (1973). The prosecutor may not appeal to the sympathy of the jury nor to their religious beliefs or to their sense of civic duty. *People v Abraham*, 256 Mich App 265, 273 (2003); *People v Cooper*, 236 Mich App 643, 651 (1999).

2. Remarks Involving Witness Testimony

The prosecutor may argue from the facts that a defendant should not be believed or that a witness should be believed. *People v Schutte*, 240 Mich App 713, 721 (2000). The prosecutor may comment on and draw inferences from the testimony given at trial; the prosecutor also may argue that a witness, including the defendant, should not be believed. *People v Buckey*, 424 Mich 1, 14–15 (1985); *People v Howard*, 226 Mich App 528, 544–545 (1997).

However, where the complaining witness testified, without prompting, that she was a religious person, and the prosecutor then couched his closing argument in terms of a credibility contest between a person with a "deep rooted belief in God" and a person who was a "liar," the defendant's conviction of third-degree criminal sexual conduct required reversal. *People v Leshaj*, 249 Mich App 417, 422 (2002).

A prosecutor may not suggest that defense counsel purposely attempted to mislead the jury, nor may a prosecutor indicate that defense counsel's veracity is questionable. *People v Watson*, 245 Mich App 572, 592 (2001).

It is improper for a prosecutor to ask a defendant to comment on the credibility of prosecution witnesses because credibility determinations are to be made by the trier of fact and a defendant's opinion on such a matter is not probative. *Buckey*, *supra*, 424 Mich at 17; *People v Loyer*, 169 Mich App 105, 117 (1988). The same rule applies to any other witness in a trial. See *Buckey, supra* at 17 n 7; *People v Bragdon*, 142 Mich App 197, 199 (1985).

3. Remarks Involving Defendant's Failure to Testify

It is impermissible for the prosecutor to comment on a defendant's failure to take the stand. *Griffin v California*, 380 US 609, 615 (1965). The prosecutor also may not direct questions to the defendant during closing arguments which would require a defendant who did not testify to explain the evidence against him. *People v Green*, 131 Mich App 232, 234–239 (1983). Such a practice would shift the burden of proof to the defendant and violate the Fifth Amendment protection against self-incrimination. However, when the defendant does take the stand the prosecutor may comment on the validity of the argument without shifting the burden of proof to the defendant. *People v Fields*, 450 Mich 94, 109–113, 116 (1995). Questioning a defendant about his failure to confront his accomplice did not violate the defendant's right to silence. *People v Hackett*, 460 Mich 202, 204–205 (1999).

A prosecutor may point out that specific inculpatory evidence is undisputed without violating the prohibition against commenting on a defendant's failure to testify—especially when a person other than the defendant could have provided testimony to dispute the evidence. *People v Perry*, 218 Mich App 520, 538 (1996).

4. Remarks Involving Failure to Produce Corroborating Witnesses

> "Courts permit the prosecutor to offer a rhetorical argument regarding a defendant's failure to produce witnesses which could corroborate his story. The underlying rationale is that the constitutional protection against defendant's failure to take the stand does not apply to witnesses. For this reason, the prosecutor has been permitted to comment on (1) defendant's failure to call an accomplice or indicted co-defendant and (2) the failure of such witnesses to testify. This is subject to the exception that the prosecutor may not comment on a witness's failure to testify when they are called by the defendant and invoke their constitutional right to remain silent. The prosecutor's comment on defendant's failure to produce these witnesses

is a permissible attempt to challenge the quality of the proffered defense. This approach does not cast the burden on defendant to prove his innocence since defendant cannot be convicted on the basis that he failed to affirmatively prove his defense." *People v Gant*, 48 Mich App 5, 8–9 (1973).

D. Standard of Review

Generally, claims of prosecutorial misconduct are reviewed de novo on a case-by-case basis to determine whether, examining the record as a whole, the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266–267 (1995); *People v Pfaffle*, 246 Mich App 282, 288 (2001).

A trial court's decision to permit the prosecution to include certain comments in its opening statement is reviewed for an abuse of discretion. *People v Jansson*, 116 Mich App 674, 690 (1982).

The court evaluates the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Leshaj,* 249 Mich App 417, 419 (2002). Prosecutorial arguments are also considered in light of the defense arguments. *People v Lawton*, 196 Mich App 341, 353 (1992). A prosecutor's prejudicial remarks during opening or closing argument will not justify reversal when no objection was made unless the defendant demonstrates plain error that affected his or her substantial rights—i.e., error that was outcome determinative. *People v Stanaway*, 446 Mich 643, 687 (1994); *People v Rivera*, 216 Mich App 648, 651 (1996).

Appeal is precluded when the prejudicial effect of the prosecutor's statements could have been corrected through instruction to the jury on a timely objection by defense counsel. *People v Gonzalez*, 178 Mich App 526, 535 (1989); *People v Hubbard*, 159 Mich App 321, 327 (1987). Potential prejudice may be cured by the court's instruction to the jury that counsel's arguments are not evidence. *Schutte, supra*, 240 Mich App at 721–722. A new trial is merited when a reasonable person would conclude that the jury was prejudiced by the prosecutor's improper conduct. *People v Tubbs*, 147 Mich 1, 9 (1907).

Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Bahoda*, *supra*, 448 Mich at 262–264.

4.46 Ineffective Assistance of Counsel*

*See Section 4.4 on the right to counsel.

US Const, Am VI

A. General Standard

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578 (2002); *People v Eloby (After Remand)*, 215 Mich App 472, 476 (1996).

To establish a claim of ineffective assistance of counsel a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland v Washington,* 466 US 668, 687 (1984); *People v Pickens*, 446 Mich 298, 302–303 (1994). In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Strickland, supra* at 690–691; *People v Stanaway*, 446 Mich 643, 687 (1994). To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland, supra* at 694; *Stanaway*, *supra* at 687–688.

In *People v Pickens*, 446 Mich 298, 302–303 (1994), the Michigan Supreme Court considered whether the Michigan Constitution requires the reversal of a criminal conviction when defense counsel's ineffective assistance did not so prejudice the defendant as to deprive him of a fair trial. The Court recognized that under *Strickland* any deficiencies in defense counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance. The Court determined that defense counsel's performance is prejudicial if there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. *Pickens, supra* at 338.

Accordingly, a defendant asserting ineffective assistance of counsel must show that counsel's performance fell below an objective standard of reasonableness, that there exists a reasonable probability that the outcome would have been different had counsel performed adequately, and that the resultant proceedings were unfair or unreliable. *People v Toma*, 462 Mich 281, 302–303 (2000); *People v Rodgers*, 248 Mich App 702, 714 (2001).

Whether to call certain witnesses is a matter of trial strategy and is not grounds for an ineffective assistance of counsel claim unless the strategy deprived the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537–538 (1990); *People v Julian*, 171 Mich App 153, 159 (1988); *People v Wilson*, 159 Mich App 345, 354 (1987). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526 (1990).

Counsel's failure to interview witnesses, alone, is not enough to show ineffective assistance; the defendant must show that the failure prevented counsel from discovering valuable information that would have "substantially

benefited" the defendant or that the attorney's unpreparedness prejudiced the defense. *People v Caballero*, 184 Mich App 636, 640–642 (1990).

An attorney is not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182 (1998). See *People v Snider*, 239 Mich App 393, 425 (2000) (the attorney's failure to object to the admission of admissible evidence was not ineffective assistance of counsel).

Without proof of substantial prejudice, a defense attorney's choice to pursue one of two weak defense strategies was not ineffective assistance. *People v LaVearn*, 448 Mich 207, 216 (1995).

B. Evidentiary (*Ginther*) Hearing

A defendant is entitled to have his or her attorney "prepare, investigate, and present all substantial defenses." *Kelly, supra*, 186 Mich App at 526. If a defendant wishes to advance a claim of ineffective assistance of counsel based on matters not of record, an evidentiary hearing (*Ginther* hearing) is required in the trial court. *People v Ginther*, 390 Mich 436, 443–444 (1973).

In *Kelly*, *supra*, the defendant, at a post-trial evidentiary hearing, claimed that his trial attorney's failure to file a timely notice of alibi defense deprived him of the effective assistance of counsel. A substantial defense is one that might have made a difference in the outcome of trial. *Kelly, supra* at 526. The *Kelly* Court determined that a substantial alibi defense would have been one in which the defendant's proposed alibi witness verified his version. According to the Court:

> "[D]efendant failed to show that he was deprived of a substantial defense. There is nothing in the record showing what the proposed alibi witnesses' testimony would have been had they been permitted to testify on the matter and, thus, whether they would have, in fact provided an alibi for defendant." *Kelly, supra* at 527.

C. Waiver of Attorney-Client Privilege

A client's allegation that an attorney breached his or her duty to the client waives the attorney-client privilege with regard to all communications relevant to the alleged breach. *People v Houston*, 448 Mich 312, 332 (1995).

D. Guilty or Nolo Contendere Plea

Issues that relate solely to the state's capacity to prove factual guilt are waived by an unconditional guilty or nolo contendere (no contest) plea. *People v New*, 427 Mich 482, 493–494 (1986). Where the alleged deficient actions of defense counsel do not relate to issues implicating the state's authority to prosecute the defendant and were waived by the defendant's valid guilty plea, the claim of ineffective assistance of counsel relating to those actions are also

waived. *People v Nunn*, 173 Mich App 56, 58–59 (1988); *People v Vonins (After Remand)*, 203 Mich App 173, 175–176 (1993).

To establish ineffective assistance of counsel in the context of a guilty plea, the inquiry is whether the defendant tendered the plea voluntarily and understandingly. *In re Oakland County Prosecutor*, 191 Mich App 113, 120 (1991). See also MCR 6.302(A). The issue is not whether, in retrospect, a court would consider defense counsel's advice to be right or wrong, but whether the advice was within the range of competence demanded of criminal defense attorneys. *In re Oakland County Prosecutor, supra* at 122, citing *McMann v Richardson*, 397 US 759, 770–771 (1970). See also *People v Mayes (After Remand),* 202 Mich App 181, 183–184 (1993); *People v Thew*, 201 Mich App 78, 89–90 (1993); *People v Hadley*, 199 Mich App 96, 99–100 (1993).

Defense counsel's decision to concede the defendant's responsibility for a lesser offense may be a tactical strategy where evidence clearly indicates the defendant is guilty of a crime; in such circumstances, counsel's concession of guilt is not necessarily ineffective assistance. *People v Savoie*, 419 Mich 118, 134–135 (1984); *People v Wise*, 134 Mich App 82, 98 (1984).

Defense counsel's failure to recognize that evidence of a defendant's good reputation for being a peaceful, law-abiding citizen might have been admissible through character witnesses fell below objective standards of reasonableness and may have deprived the defendant of an effective defense.* *People v Hyland*, 212 Mich App 701, 710–711 (1995), modified on other grounds 453 Mich 902 (1996).

*MRE 404(a)(1), the "mercy rule," gives a defendant the absolute right to introduce evidence of a relevant character trait to show that the defendant could not have committed the charged offense. *People v Whitfield*, 425 Mich 116, 130 (1986).

Counsel may be found ineffective and a defendant's plea found involuntary or unknowing if counsel failed to explain to the defendant the nature of the criminal charges against him or her, or if counsel failed to discuss with the defendant the possible defenses he or she might have against the charges to which the defendant is pleading guilty. *People v Jackson*, 203 Mich App 607, 614 (1994). A defendant's attorney is required to explain to the defendant the range and consequences of the choices available to the defendant with enough detail to allow the defendant to make an intelligent and informed choice. *Jackson*, *supra* at 614; *Thew*, *supra* 201 Mich App at 92, 95. Absent unusual circumstances, where counsel has adequately apprised the defendant of the nature of the charges and the consequences of a plea, a defendant can make an informed and voluntary choice whether to plead guilty or go to trial without a specific recommendation from counsel. *People v Corteway*, 212 Mich App 442, 446 (1995). Counsel is not required to make a recommendation, and the failure to provide such advice does not necessarily constitute the ineffective assistance of counsel. *Id*.

E. Appellate Standard

An appellate attorney may be ineffective for failing to raise the issue of the defendant's trial counsel's effectiveness. *People v Reed*, 198 Mich App 639,

646 (1993). The standard set forth in *Strickland* also applies when analyzing a claim of ineffective assistance of appellate counsel. *Id*. According to the *Reed* Court:

> "An appellate attorney's failure to raise an issue may result in counsel's performance falling below an objective standard of reasonableness if that error is sufficiently egregious and prejudicial. However, appellate counsel's failure to raise every conceivable issue does not constitute ineffective assistance of counsel. Counsel must be allowed to exercise reasonable professional judgment in selecting those issues most promising for review. The fact that counsel failed to recognize or failed to raise a claim despite recognizing it does not per se constitute cause for relief from judgment. Thus, to permit proper review in cases where appellate counsel has pursued an appeal as of right and raised nonfrivolous claims, the defendant must make a testimonial record in the trial court in connection with a claim of ineffective assistance of appellate counsel [internal citations omitted]." *Reed, supra* at 646–647.

The defendant's failure to move for a new trial or an evidentiary hearing on a claim of his or her trial counsel's ineffective assistance forecloses appellate review unless the record contains sufficient detail to support the defendant's claims. *People v Barclay*, 208 Mich App 670, 672 (1995). If the record is sufficient in this regard, appellate review is limited to the record.

F. Standard of Review

Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579 (2002). A trial court's findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id*.; MCR 2.613(C); MCR 6.001(D).

4.47 Directed Verdict

MCR 6.419 Motion for directed verdict of acquittal

A. Rule

MCR 6.419 provides in part:

> "(A) Before Submission to Jury. After the prosecutor has rested the prosecution's case in chief and before the defendant presents proofs, the court on its own initiative may, or on the defendant's motion must, direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction. The

court may not reserve decision on the defendant's motion. If the defendant's motion is made after the defendant presents proofs, the court may reserve decision on the motion, submit the case to the jury, and decide the motion before or after the jury has completed its deliberations.

"(B) After Jury Verdict. After a jury verdict, the defendant may file an original or renewed motion for directed verdict of acquittal in the same manner as provided by MCR 6.431(A) for filing a motion for a new trial."

B. Test Applied by the Court

The test for determining a defendant's motion for directed verdict is whether the evidence, viewed in the light most favorable to the prosecution, is sufficient to permit a rational trier of fact to find the essential elements of the crime to be proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368 (1979). See also *Jackson v Virginia*, 443 US 307, 319 (1979).

The *Hampton* standard remains the test for determining whether there is sufficient evidence to support a conviction. *People v Wolfe*, 440 Mich 508, 513–516 (1992). Inherent in the task of considering the proofs in the light most favorable to the prosecution is the absence of any weighing of the proofs or a determination whether testimony favorable to the prosecution is to be believed. All such concerns are to be resolved in favor of the prosecution. *Id*. at 514–515. See also *People v Johnson*, 460 Mich 720, 722–723 (1999).

"The court must consider a motion for a new trial challenging the weight or sufficiency of the evidence as including a motion for a directed verdict of acquittal." MCR 6.431(D). A trial court does not sit as the thirteenth juror in ruling on motions for a new trial and may grant a new trial only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon,* 456 Mich 625, 627 (1998).

C. Motion for Involuntary Dismissal in Bench Trial

*See Section 4.40 on bench trials.

A motion to dismiss at the close of the prosecution's case* is similar to a jury trial motion for a directed verdict:

"[I]n both jury and nonjury trials [such a motion] is governed by the rule that the prosecutor has the burden of producing in his case in chief some evidence as to each element of the crime charged to warrant putting the defendant to his defense." *People v DeClerk*, 400 Mich 10, 17 (1977).

Proposed amendments to the court rules applicable to criminal procedure would specifically provide for a motion for acquittal in a bench trial:

> "(C) Bench Trial. In an action tried without a jury, after the presentation of the plaintiff's evidence, the defendant, without waiving the right to offer evidence if the motion is not granted, may move for acquittal on the ground that a reasonable doubt exists. The court may then determine the facts and render a verdict of acquittal, or may decline to render judgment until the close of all the evidence. If the court renders a verdict of acquittal, the shall make findings of fact." MCR 6.419(C), as proposed.

D. Double Jeopardy Implications

When a trial court grants a defendant's motion for directed verdict, the prohibition against double jeopardy* prevents further action against the defendant based on the same charges. *People v Nix*, 453 Mich 619, 626–627 (1996).

*See Section 4.14 on double jeopardy.

E. Standard of Review

In reviewing a trial court's decision on a motion for a directed verdict, an appellate court reviews the record de novo to determine whether the evidence presented, viewed in the light most favorable to the prosecution, could have persuaded a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122 (2001).

4.48 Jury Instructions

MCR 6.414(F) Conduct of jury trial; instructions to the jury

MCR 6.414(G) Materials in the jury room

MCL 768.29 Duty of judge at trial; effect of failure to instruct

MCL 768.30 Exception to charge or refusal to charge; necessity

A. Generally

The court is required to instruct the jury on the law applicable to the case. MCL 768.29; MCR 6.414(F). Jury instructions are required to address each element of an offense charged and the parties' defenses or theories that are supported by the evidence. *People v Wess*, 235 Mich App 241, 243 (1999). Instructions for which no supporting evidence exists should not be given. *Id*.

Use of the Standard Criminal Jury Instructions is not mandated. *People v Stinnett*, 163 Mich App 213, 215 (1987).

The court may permit the jury to have a writing, other than the charging document, that contains the elements of the charges against the defendant. MCR 6.414(G). At the request of a party, the jury, or on its own, the court may provide the jury with a full set of written or electronically recorded instructions, or a partial set of written or recorded instructions if the parties agree on the provision and content of the partial instructions. MCR 6.414(G). Any instructions given to the jury must be made part of the record. MCR 6.414(G).

The court should be careful to characterize the instructions given as the court's instructions rather than identify them as instructions requested by a party. *People v Hunter,* 370 Mich 262, 268 (1963).

Failure to give an instruction is not grounds for setting aside the verdict unless it was requested by the defendant. MCL 768.29.

B. Content of Instructions

Each party has the opportunity to submit requested instructions to the court before closing argument. MCR 6.414(F). A copy of the written instructions submitted to the court must be served on the other parties. *Id*. Before closing argument, the court must inform the parties of its proposed action on the requests. MCR 6.414(F). Ordinarily, instructions are given after closing argument, but the court may instruct the jury before closing argument if the parties agree. MCR 6.414(F).

> "It is structural error requiring automatic reversal to allow a jury to deliberate a criminal charge where there is a complete failure to instruct the jury regarding any of the elements necessary to determine if the prosecution has proven the charge beyond a reasonable doubt." *People v Duncan,* 462 Mich 47, 48 (2000).

However, failure to instruct a jury on one of several elements may be subject to a harmless-error analysis. *Neder v United States,* 527 US 1, 10 (1999).

C. Instructions on Lesser Included Offenses

MCL 768.32 Offenses consisting of different degrees; verdict

CJI2d 3.8 Composite instructions; less serious crimes

1. Necessarily Included Lesser Offenses

Either party may request instructions on lesser included offenses. *People v Hendricks*, 446 Mich 435, 442 (1994).

The Michigan Supreme Court has adopted the federal rule on lesser included offense instructions. Under the federal system, instructions are not given on cognate lesser offenses, but only on necessarily included

lesser offenses if the element that differentiates the lesser from the greater offense is sufficiently in dispute. *People v Cornell*, 466 Mich 335, 357 (2002). See also *People v Mendoza,* 468 Mich 527, 533 (2003).

In *Cornell,* the Court established a two-prong test:

> "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Cornell, supra*, 466 Mich at 357.

"Express allowance for the jury to find a defendant guilty of an inferior degree of an offense is presently provided by statute." *Hendricks*, *supra*, 446 Mich at 441–442. MCL 768.32 provides in part:

> "(1) Except as provided in subsection (2),* upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense."

*Subsection (2) concerns indictments for controlled substance offenses listed in MCL 333.7401(2)(a)(i) or (ii) or MCL 333.7403(2)(a)(i) or (ii).

"MCL 768.32(1) 'only permits instructions on necessarily included lesser offenses, not cognate lesser offenses.'" *People v Reese*, 466 Mich 440, 446 (2002), citing *Cornell, supra*, 466 Mich at 356.

> "The word 'inferior' in the statute does not refer to inferiority in the penalty associated with the offense, but rather, to the absence of an element that distinguishes the charged offense from the lesser offense. The controlling factor is whether the lesser offense can be proved by the same facts that are used to establish the charged offense." *People v Torres*, 222 Mich App 411, 420 (1997).

"'Necessarily included' lesser offenses encompass situations in which it is impossible to commit the greater offense without first having committed the lesser." *Hendricks, supra* at 443; *People v Bearss*, 463 Mich 623, 627 (2001).

The duty of the trial judge to instruct on lesser included offenses is determined by the evidence. If evidence has been presented which would support a conviction of a lesser included offense, refusal to give a requested instruction is reversible error. Even over the objection of counsel, a defendant can make a knowing waiver of the right to instructions on lesser included offenses. *People v Jones*, 424 Mich 893 (1986).

2. Cognate Lesser Included Offenses

In *Cornell, supra*, 446 Mich at 357, contrary to existing precedent, the Michigan Supreme Court announced that the jury should not be instructed on cognate lesser offenses. The Court held that except as provided in MCL 768.32(2) (regarding major controlled substance offenses), the jury must be instructed on necessarily included lesser offenses, if the difference between the greater and lesser offense is in dispute. *Id*.

> "'Cognate' lesser included offenses are those that share some common elements, and are of the same class or category as the greater offense, but have some additional elements not found in the greater offense." *Hendricks, supra* at 443.

See also *People v Perry*, 460 Mich 55, 61 (1999).

3. Lesser Included Misdemeanors

The five conditions for a lesser included misdemeanor offense instruction are: (1) there must be a proper request for the instruction; (2) there must be an inherent relationship between the greater and lesser offenses (to be inherently related, the offenses must relate to the protection of the same interests, and by their general nature, proof of the lesser offense is necessarily presented in showing the greater offense); (3) a rational view of the evidence at trial must support the requested misdemeanor instruction; (4) if the prosecution is requesting the instruction on a lesser included offense, the defendant must have been given adequate notice; and (5) the instructions requested must not result in undue confusion or injustice. See *People v Steele*, 429 Mich 13, 19–22 (1987).

D. Standard of Review

Claims of instructional error are reviewed de novo on appeal. *People v Perez*, 469 Mich 415, 418 (2003). It is the function of the trial court to clearly present the case to the jury and instruct them on the applicable law. *People v Katt,* 248 Mich App 282, 310 (2001). Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *Id*.

Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Dabish,* 181 Mich App 469, 478 (1989). The reviewing court must balance the general tenor of the instructions in their entirety against the potentially misleading effect of a single isolated sentence. *People v Freeland,* 178 Mich App 761, 766 (1989). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Wolford,* 189 Mich App 478, 481 (1991).

> "A trial judge, having properly applied the law to the facts in a criminal case in which intent is not involved, and where the facts are undisputed, may say to the jury that it is their duty to bring in a verdict of guilty, but he may not go further and peremptorily direct or compel such verdict. The responsibility for the verdict must be left with the jury. It must be their verdict, not the verdict of the judge." *People v Heikkala*, 226 Mich 332, 337 (1924).

Failure to give an instruction on a lesser included offense is subject to harmless error analysis. *People v Mosko*, 441 Mich 496, 502 (1992).

4.49 Jury Deliberation

MCR 6.414(F) Conduct of jury trial; instructions to the jury

MCR 6.414(G) Conduct of jury trial; materials in jury room

MCR 6.414(H) Conduct of jury trial; review of evidence

CJI2d 3.12 Composite jury instructions

A. Materials in Jury Room

The court may permit the jury to take into the jury room any exhibits and writings admitted into evidence. See MCR 6.414(G). A trial court may not provide the jury with evidence that has not been admitted. *People v Davis,* 216 Mich App 47, 57 (1996). Although not authorized, the court may discover that jurors have used extraneous evidence such as dictionaries, maps or exhibits not admitted into evidence. Prompt, appropriate action by the trial court may render the error harmless. For example, the extraneous evidence might be removed from the jury immediately upon its discovery and a cautionary instruction given. See *People v Messenger,* 221 Mich App 171, 175–178 (1997). See also *People v Gayton,* 81 Mich App 390, 396–398 (1978); *People v Jones,* 128 Mich App 335, 337 (1983); *People v Clark,* 220 Mich App 240, 244–246 (1996) (where the discovery of two packets of cocaine in admitted exhibits was not harmless). If the use of the extraneous evidence was not intrinsically offensive to the maintenance of the judicial system, a review under the standard set forth in *People v Budzyn,* 456 Mich 77, 88–89 (1997) is appropriate.

B. Juror Conduct

A collective reenactment by the jury with a gun as to where the victim was likely sitting and where the gun should have fallen was not a sufficient basis for a new trial. *People v Fletcher,* 260 Mich App 531, 541–544 (2004). The Court of Appeals distinguished this conduct from a reenactment or experiment outside of the jury room by a juror or group of jurors.

The Michigan Supreme Court in *Budzyn, supra*, 456 Mich at 88–89, set forth a procedure to determine whether extrinsic or external influences affected a jury verdict. Juror affidavits "may only be received on extraneous or outside errors, such as undue influence by outside parties." *Id.* at 91. Any conduct, albeit misguided, that is inherent in the deliberative process is not subject to challenge or review. *Fletcher, supra*, 260 Mich App at 540.

C. Hung Jury

If a jury appears to be deadlocked, first read CJI2d 3.12 to see if that prompts a verdict. See *People v Sullivan*, 392 Mich 324, 329–331 (1974); *People v Larry*, 162 Mich App 142, 148–151 (1987).

If it appears the jury is unable to reach a verdict after having been given CJI2d 3.12, have the jury return and question the foreperson on the record to determine whether it appears that is impossible for the jury to reach a verdict. The trial judge should not ask how their voting stands. *People v Hickey*, 103 Mich App 350, 353 (1981).

> "Trial judges are hereafter prohibited from asking any questions of jurors the answer to which might reasonably be expected to disclose the numerical division of the jury. Hence, it is strongly urged upon the trial bench that this be explained before any necessary and proper questioning regarding the state of the jury's deliberations begins." *People v Luther*, 53 Mich App 648, 650–651 (1974).

Possible questions include:

- Is the jury deadlocked?
- How long has it been deadlocked?
- Has there been any change in the voting one way or the other?
- Do the jurors appear to have fundamental differences that cannot be resolved?
- Also, ask counsel if they wish to inquire of the foreperson.

If the court decides to declare a mistrial,* explain that the declaration of a mistrial is discretionary with the court, and the court is exercising its discretion in light of the information received regarding the state of the jury deliberations.

*See Section 4.52 for more information about mistrial and double jeopardy implications.

See *People v Lett*, 466 Mich 206, 208 (2002), where the defendant's protection against double jeopardy was not violated by his retrial and conviction after the first trial was declared a mistrial and neither party objected.

D. Standard of Review

A trial court's decision whether to grant a mistrial based on juror misconduct during deliberation is reviewed for an abuse of discretion. *People v Messenger,* 221 Mich App 171, 175 (1997).

A trial court's declaration of a mistrial on the basis that the jury is unable to reach a unanimous verdict is reviewed for an abuse of discretion. *Lett, supra*, 466 Mich at 208.

4.50 Jury Questions

MCR 6.414(A) Conduct of jury trial; court's responsibility

MCR 6.414(H) Conduct of jury trial; review of evidence

CJI2d 2.9 Procedural Instructions; questions by jurors

A. Communication with the Jury

Ordinarily communications with a jury should occur in open court and in the presence of, or after notice to, the parties or their attorneys. *Wilson v Hartley*, 365 Mich 188, 189 (1961).

There are three categories of communication with a deliberating jury. *People v France*, 436 Mich 138, 142–144 (1990). These categories are discussed below.

1. Substantive

> "Substantive communication encompasses supplemental instructions on the law given by the trial court to a deliberating jury. A substantive communication carries a presumption of prejudice in favor of the aggrieved party regardless of whether an objection is raised. The presumption may only be rebutted by a firm and definite showing of an absence of prejudice." *France, supra* at 143.

2. Administrative

> "Administrative communications include instructions regarding the availability of certain pieces of evidence and instructions that encourage a jury to continue its deliberations. An administrative communication carries no presumption. The failure to object when made aware of the communication will be taken as evidence that the administrative instruction was not prejudicial. Upon an

objection, the burden of persuasion lies with the nonobjecting party to demonstrate that the communication lacked any prejudicial effect." *France, supra* at 143.

3. Housekeeping

"Housekeeping communications are those which occur between a jury and a court officer regarding meal order, rest room facilities, or matters consistent with general 'housekeeping' needs that are unrelated in any way to the case being decided. A housekeeping communication carries the presumption of no prejudice. First, there must be an objection to the communication, and then the aggrieved party must make a firm and definite showing which effectively rebuts the presumption of no prejudice." *France, supra* at 144.

B. Questions During Trial

"The questioning of witnesses by jurors, and the method of submission of such questions, rests in the sound discretion of the trial court. The trial judge may permit such questioning if he wishes, and it was error for a judge to rule that under no circumstances might a juror ask any questions." *People v Heard*, 388 Mich 182, 188 (1972). See CJI2d 2.9.

C. Requests to Rehear Testimony

With regard to a jury's request to rehear testimony, a trial court must use its discretion to assure fairness and refuse requests that are unreasonable, but the court may not refuse a request for fear of placing too much emphasis on a particular witness. *People v Howe*, 392 Mich 670, 676 (1974); *People v Davis*, 216 Mich App 47, 56 (1996); *People v Crowell*, 186 Mich App 505, 508 (1990).

It is not an abuse of discretion to refuse a jury's request to review transcripts when both attorneys agree to the denial. *People v Fetterley*, 229 Mich App 511, 520 (1998); *People v Wytcherly (On Rehearing)*, 176 Mich App 714, 716 (1989). Such an agreement may waive appellate review on the denial. See *People v Carter*, 462 Mich 206, 214 (2000). A trial court may not provide the jury with evidence that was not admitted at trial. *People v Davis*, 216 Mich App 47, 57 (1996).

It is within the sound discretion of the trial court to determine whether testimony may be read to the jury and the extent of that reading. The trial court may direct a jury to continue deliberating without rehearing testimony, as long as the possibility of rehearing the testimony later is not ruled out. *People v Johnson*, 128 Mich App 618, 622 (1983).

A trial court may ask a jury to try to narrow down a request for testimony. The trial court may explain that no printed copy of testimony is available and if possible offer the jury a choice between listening to audio tapes or having a court reporter read his or her notes. *People v Sullivan*, 167 Mich App 39, 48–49 (1988). See also *People v Dalessandro*, 165 Mich App 569, 583 (1988) and *People v White*, 144 Mich App 698, 703–704 (1985). These cases suggest a court has discretion to replay videotaped testimony for a jury, but that issue has apparently not been addressed by the appellate courts.

D. Requests to Clarify Instructions

"Where confusion is expressed by a juror, it is incumbent upon the court to guide the jury by providing a 'lucid statement of the relevant legal criteria.'" *People v Martin*, 392 Mich 553, 558 (1974), quoting *Bollenbach v United States*, 326 US 607, 612 (1946), overruled in part on other grounds sub nom *People v Woods*, 416 Mich 581, 621 n 12 (1982). The decision to provide additional instructions at the request of the jury is within the discretion of the trial court. *Id*. If there is confusion about the verdict and the jury has not been discharged, the court has the authority to reinstruct the jury and have it clarify, after further deliberation, its intended verdict. See *People v Henry*, 248 Mich App 313, 320 n 20 (2001).

E. Standard of Review

A trial court's decisions with regard to jury communication and questions are reviewed for an abuse of discretion. See *Fetterley, supra*, 229 Mich App at 520.

4.51 Verdict

MCR 6.410 Jury trial; number of jurors; unanimous verdict

MCR 6.420 Verdict

A. Number

A unanimous verdict of all 12 jurors is required in a criminal case. MCR 6.410; *People v Cooks,* 446 Mich 503, 510–511 (1994). Following the procedure outlined in MCR 6.410(A), the parties, with the court's consent, can agree to have the case decided by a specified number of jurors less than 12 at any time before a verdict is returned. See also MCL 768.18.

If the parties indicate their willingness to stipulate to a jury of less than 12 members, the court must advise the defendant of his or her right to have the case decided by a jury of 12. MCR 6.410(A). The court must make a verbatim record that the defendant understands the right and if the defendant makes a valid waiver of the right to be tried by a jury of 12, the court may accept the

parties' stipulation and proceed. *Id*. The court may refuse to accept the parties' stipulation even when the defendant validly waived the right. If the court does so refuse, it must state its reasons for refusal on the record. *Id*.

B. Polling

After returning its verdict and before the jury is discharged,

> "the court on its own initiative may, or on the motion of a party must, have each juror polled in open court as to whether the verdict announced is that juror's verdict. If polling discloses the jurors are not in agreement, the court may (1) discontinue the poll and order the jury to retire for further deliberations, or (2) either (a) with the defendant's consent, or (b) after determining that the jury is deadlocked or that some other manifest necessity exists, declare a mistrial* and discharge the jury." MCR 6.420(C).

*See Section 4.52, below, for more information.

> "If a juror expresses disagreement with the verdict when the jury is polled, the jury must be sent out for further deliberations. The continuation of the polling and the subsequent questioning of the dissenting juror were improper because of their potentially coercive effect." *People v Echavarria*, 233 Mich App 356, 362 (1999).

C. Alternative Theories

The alternate theories of a defendant's state of mind relate to a single element of a single offense. When a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theory. *People v Johnson*, 187 Mich App 621, 629–630 (1991). Likewise, the jury does not have to unanimously decide whether the defendant was the principal or an aider and abettor where both theories were supported by the evidence. *People v Smielewski,* 235 Mich App 196, 201–203 (1999). See also *People v Gadomski*, 232 Mich App 24, 29–32 (1998). Because bodily injury, mental anguish, and the other conditions listed in MCL 750.520a(j) are merely different ways of defining the single element of personal injury, they should not be construed to represent alternative theories upon which jury unanimity is required. Accordingly, if the evidence of any one of the listed definitions is sufficient, then the element of personal injury has been proven. *People v Acevedo*, 217 Mich App 393, 397 (1996).

However, if the evidence could support two separate convictions, but only one is charged, unanimity is required. In *People v Yarger*, 193 Mich App 532, 536–537 (1992), the information charged the defendant with one act of sexual penetration. The complainant's testimony would have supported two separate convictions of third-degree criminal sexual conduct, each based on a separate sexual penetration. The jury instruction allowed the jury to convict the defendant of the single sexual penetration charged if it believed that the

evidence proved either penetration, or both, beyond a reasonable doubt. Error requiring reversal occurred when the jury was not instructed that it must unanimously agree which act (or acts) was proven beyond a reasonable doubt because it was impossible to discern which act of penetration formed the basis of the jury's verdict.

D. Inconsistent Verdicts

Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment. *Dunn v United States*, 284 US 390, 393 (1932).

Juries are not held to any rules of logic nor are they required to explain their decisions. The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency. *People v Vaughn*, 409 Mich 463, 466 (1980). These considerations change when a case is tried by a judge sitting without a jury. *Id*. at 466.

E. Reconvening Jury

The jury cannot be reconvened after being discharged in a criminal case. *People v Henry*, 248 Mich App 313, 320 (2001); *People v McGee*, 247 Mich App 325, 340–341 (2001).

4.52 Mistrial*

*See Section 4.49(C) on hung jury.

US Const, Am V

Const 1963, art I, §15

A. Determination

A motion for mistrial raises the issue of double jeopardy.* The federal and state constitutions prohibit twice placing an individual in jeopardy of life or limb for the same offense. US Const, Am V; Const 1963, art 1, § 15. The declaration of a mistrial is an extreme remedy which should only be granted once all other options are explored and exhausted. It inevitably raises double jeopardy concerns. Unless the defendant has consented, it should only be granted for "manifest necessity." *People v Hicks*, 447 Mich 819, 828–829 (1994). The defendant's consent to a mistrial cannot be implied and must be expressly obtained on the record. See *People v Anglin*, 6 Mich App 666, 671–675 (1967).

*See Section 4.14 on double jeopardy.

The general rule as to whether after the discharge of a sworn jury a defendant has been in jeopardy is as follows:

> "[T]aking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; . . . the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. . . . The application of the test of overruling or manifest necessity . . . is left to the sound discretion of the trial judge." *People v Anglin*, 6 Mich App 666, 672–674 (1967), quoting *United States v Perez*, 22 US 579 (1824).

Where a jury foreman announced guilty verdicts but the trial court sua sponte declared a mistrial during the polling of the jury after discovering that 13 jurors had been in the jury room, the court had the power to later revoke the declaration. *People v McGee*, 247 Mich App 325, 336–337 (2001). However, the court did not have the power to reconvene the jury to resume polling once the jury had been discharged. *Id*. Because there was manifest necessity to justify a retrial in the case, defendant's double jeopardy rights did not come into play. *Id*. at 330.

B. Attachment of Jeopardy

"Jeopardy attaches 'once the defendant is put to trial before the trier of fact, whether [it] be a jury or a judge.'" *People v Hicks*, 447 Mich 819, 826 (1994), quoting *United States v Jorn*, 400 US 470, 479 (1971). When a defendant is tried by a jury, jeopardy attaches when the jury is impaneled and sworn. *Id.* at 827 n 13, citing *Serfass v United States*, 420 US 377, 388 (1975). When a defendant is tried by a judge, jeopardy attaches when the judge begins to hear the evidence of the case. *Id.* at 826.

C. Permissible Retrials

A defendant may be retried when the first trial is interrupted and the defendant agreed to the interruption or when manifest necessity results in a mistrial being declared. *People v Mehall*, 454 Mich 1, 4 (1997). A defendant may be retried, and there is no violation of the right against double jeopardy, when the defendant either moves for or consents to the declaration of a mistrial. *Hicks*, *supra* at 827. A manifest necessity may be declared when a jury is unable to reach a unanimous verdict. *Mehall, supra*, 454 Mich at 5. See *People v Riemersma*, 104 Mich App 773, 777–778 (1981). Retrial on the same offense is permissible in this situation because the sufficiency of the evidence has not been evaluated. *Id*.

> "Consistent with the special respect accorded to the court's declaration of a mistrial on the basis of jury deadlock, this Court has never required an examination of alternatives before a trial judge declares a mistrial on the basis of jury deadlock; nor have we ever required that the judge conduct a 'manifest necessity' hearing or make findings on the record. In fact, we long ago stated that, 'at

> most, . . . the inquiry in [such a case] turns upon determination *whether the trial judge was entitled to conclude that the jury in fact was unable to reach a verdict.*' Moreover, the United States Supreme Court has expressly indicated that the failure of a trial judge to examine alternatives or to make findings on the record before declaring a mistrial does not render the mistrial declaration improper. Instead, where the basis for a mistrial order is adequately disclosed by the record, the ruling will be upheld. . . . We are not aware of any requirement that a trial court sua sponte instruct a deadlocked jury to resume deliberations. Moreover, we remain cognizant of the significant risk of coercion that would necessarily accompany a requirement that a deadlocked jury be forced to engage in protracted deliberations [citations omitted]." *People v Lett*, 466 Mich 206, 221–223 (2002).

A defendant's double jeopardy rights were not violated and the defendant may be retried when the defendant was not implicitly acquitted of the charge at issue in the second prosecution. *People v Garcia*, 448 Mich 442, 449 (1995). A defendant is implicitly acquitted of the greater charged offense when the factfinder is given the opportunity to choose to convict the defendant of a lesser included offense and either convicts or acquits the defendant of the lesser offense. *Id.* at 450–451.

D. Example—Polygraph Test Results

The mere mention of a polygraph test,* without more, does not require a mistrial. *People v Johnson*, 396 Mich 424, 435–437 (1976); *People v King*, 215 Mich App 301, 308 (1996). In *People v Rocha*, 110 Mich App 1, 9 (1981), the Court of Appeals set forth the factors to be considered in determining whether or not mention of a polygraph was grounds for a mistrial:

*See Chapter 2, Section 2.21 for further discussion of polygraph tests.

> "This Court should consider: (1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted."

1. Mention of Polygraph Required Reversal

> When, during a bench trial, the prosecutor mentioned a polygraph examination of the defendant, a copy of which was filed with the court, and the judge questioned the officer regarding the number of polygraph tests he had performed in the past, the conviction was reversed as the prosecutor's injection of the polygraph testing and results was unfairly prejudicial to the defendant's case, even though the court found it had not been influenced by this information. *People v Smith*, 211 Mich App 233, 234–235 (1995).

In *People v Brocato*, 17 Mich App 277, 291–294 (1969), a prosecutor's repeated references to polygraph tests, after a warning by the court, was held improper and contemptuous.

In *People v Nash*, 244 Mich App 93, 101 (2000), the court found that a key prosecution witness' reference to taking a polygraph test seriously affected the fairness of the trial.

2. Mention of Polygraph Did Not Require Reversal

In *People v Triplett*, 163 Mich App 339 (1987), remanded on other grounds, 432 Mich 568 (1989), a witness' reference to a "specialized interview" was not considered improper or inadmissible because there was no specific reference to the fact that the defendant had failed a polygraph examination.

In *People v Tyrer*, 19 Mich App 48, 50 (1969), a police officer's comment that the defendant said he would take a polygraph examination if his attorney advised him to do so was not prejudicial when the defendant was aware of the possible error and chose to waive his objection and proceed with the trial.

E. Standard of Review

The decision on a motion for mistrial is reviewed for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36 (1999). "An abuse of that discretion will be found only when the trial court's denial of the motion has deprived the defendant of a fair and impartial trial." *People v Wolverton,* 227 Mich App 72, 75 (1997). See also *People v Lett*, 466 Mich 206, 220 (2002).

4.53 New Trial

MCR 6.431 New trial

MCL 769.26 Error in pleading or procedure; effect

MCL 770.1 New trial; reasons for granting

A. Generally

A motion for new trial may be filed within 42 days after the entry of judgment. MCR 6.431(A)(1). If a claim of appeal has been filed, a motion for new trial must be filed as required by MCR 7.208(B) or MCR 7.211(C)(1). MCR 6.431(A)(2). The court may order a new trial on any ground that would support appellate reversal of the conviction or because the court believes that the verdict has resulted in a miscarriage of justice. MCR 6.431(B). The court must make a record of its reasons for granting or denying the motion. The court may state the reasons on the record or state them in a written ruling made

part of the record. *Id*. See also MCL 769.26; MCL 770.1; *People v Lemmon*, 456 Mich 625, 633–646 (1998). MCR 6.431(C) addresses a motion for new trial after a bench trial.

If an appeal has been filed, an expedited hearing is required within 28 days of filing, with the transcript to be filed within 28 days of the hearing. MCR 7.208(B). The trial court can adjourn the hearing to secure evidence or for other good cause. MCR 7.208(B)(3).

A trial judge does not sit as the thirteenth juror in ruling on motions for a new trial and may grant a new trial only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627 (1998).

MCL 769.26 states:

> "No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."

The mere finding of error in the admission or exclusion of evidence is not alone cause for reversal. The statute cited above embodies what is commonly referred to as Michigan's "harmless error rule." See *People v Lukity*, 460 Mich 484, 491 (1999). In *Lukity*, our Supreme Court held that MCL 769.26 not only "creates a presumption that preserved, unconstitutional error is harmless," it also demands that the defendant (rather than the prosecution) bears the burden of demonstrating that it is "more probable than not" that the error complained of undermined the reliability of the verdict or resulted in a miscarriage of justice. *Id*. at 493–494. The decision whether to admit evidence is within the trial court's discretion and will be reversed only where there is an abuse of discretion. *Id*. at 488.

B. Grounds for a New Trial

1. Jury Misconduct

A juror's misconduct* does not automatically warrant a new trial. *People v Strand*, 213 Mich App 100, 103–104 (1995); *People v Riemersma*, 104 Mich App 773, 785 (1981).

In *Strand*, two jurors testified at a posttrial hearing that they had learned defendant had a prior sexual assault conviction, but that they questioned the truth of the information and that it did not affect the impartiality of their verdicts. The Court of Appeals held that under those circumstances,

*For more information on juror conduct and its post-verdict consequences, see Section 4.51.

the trial court did not abuse its discretion in denying the motion for new trial.

2. Misconduct Involving the Parties, Witnesses, or Attorneys

Unfortunately, witnesses may give testimony that the court concludes should be stricken. The usual remedy is a cautionary instruction as was given in *People v Droste*, 160 Mich 66, 77–78 (1910). See also *People v Stinson*, 113 Mich App 719, 727 (1982), and *People v Von Everett*, 156 Mich App 615, 622 (1986). However, a different outcome may be warranted where the impermissible testimony was given by a police officer. *People v Holly*, 129 Mich App 405, 415–416 (1983). In *Holly*, the Court of Appeals reviewed a police officer's non-responsive and inadmissible answer on cross-examination and held:

> "[W]hen an unresponsive remark is made by a police officer, this Court will scrutinize that statement to make sure the officer has not ventured into forbidden areas which may prejudice the defense. Police witnesses have a special obligation not to venture into such forbidden areas. The police officer's original response was clearly nonresponsive. Being a police sergeant and the officer in charge of the case, he should have known better than to volunteer such information. Inadmissible evidence tying a defendant to other crimes is highly prejudicial [internal citations omitted]."

The severity and repetitiveness of prejudicial remarks are considered when determining if a new trial is warranted. Whereas one remark may not prejudice the jury, repetitive remarks can be so damaging that a new trial is required. *Wayne Co Rd Comm'n v GLS LeasCo, Inc*, 394 Mich 126, 131 (1975). Often the harmful effects of prejudicial remarks can be corrected through the court's instruction to the jury. The judge can prevent a miscarriage of justice by explaining that evidence and not the comments of attorneys are what directs a verdict. *People v Johnson*, 382 Mich 632, 649 (1969).

A violation of the Fourteenth Amendment Due Process Clause of the United States Constitution occurs when a prosecutor in bad faith fails to preserve potentially exculpatory evidence. *Arizona v Youngblood*, 488 US 51, 57–58 (1988). Whether the prosecutor acted in bad faith is a question of law for the court, not the jury. *People v Cress*, 468 Mich 678, 690 n 4 (2003).

3. Newly Discovered Evidence

> "For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) 'the evidence itself, not merely its materiality, was newly discovered'; (2) 'the newly discovered evidence was not

> cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) the new evidence makes a different result probable on retrial." *Cress, supra*, 468 Mich at 692, quoting *People v Johnson*, 451 Mich 115, 118 n 6 (1996).

The discovery that testimony introduced at trial was perjured may be grounds for a new trial." *People v Mechura*, 205 Mich App 481, 483 (1994).

The affidavit of a recanting witness may not be sufficient. *People v Dupree*, 128 Mich App 368, 370–371 (1983).

The trial court has discretion whether to grant a new trial on the basis of recanting testimony and due regard must be given to the trial court's superior opportunity to appraise the credibility of the recanting witnesses and other trial witnesses. *People v Canter*, 197 Mich App 550, 560 (1992). Where newly discovered evidence takes the form of recantation testimony, Michigan courts traditionally regard it as suspect and untrustworthy and only reluctantly grant new trials on this basis. *Canter*, *supra*, 197 Mich App at 559–560.

When a third party's "confession" is the newly discovered evidence on which a defendant's new trial motion is based, the trial court should determine the veracity of the confession in light of established evidence. "A false confession (i.e., one that does not coincide with established facts) will not warrant a new trial, and it is within the trial court's discretion to determine the credibility of the confessor." *People v Cress*, 468 Mich 678, 692 (2003).

Newly discovered evidence is not grounds for a new trial where it would merely be used primarily for impeachment purposes. *People v Davis*, 199 Mich App 502, 516 (1993).

4. Insufficient Evidence

In determining whether the prosecutor has presented evidence sufficient to support a defendant's conviction, an appellate court

> "'must consider not whether there was any evidence to support the conviction but whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt."' *People v Wolfe*, 440 Mich 508, 513–514 (1992), quoting *People v Hampton*, 407 Mich 354, 366 (1979).

5. Polygraph Examinations

*For more detailed information on polygraph examinations and evidence, see Chapter 2, Section 2.21.

Polygraph results* may be admissible in support of a defendant's motion for new trial. *People v Barbara*, 400 Mich 352, 412 (1977); *People v Mechura*, 205 Mich App 481, 484 (1994).

> "Polygraph test results may be considered in deciding a motion for new trial under the following circumstances: (1) they are offered on behalf of the defendant, (2) the test was taken voluntarily, (3) the professional qualifications and the quality of the polygraph equipment meets with the approval of the court, (4) either the prosecutor or the court is able to obtain an independent examination of the subject or of the test results by an operator of the court's choice, and (5) the results are considered only with regard to the general credibility of the subject." *Mechura*, *supra*, 205 Mich App at 484.

C. Standard of Review

The decision on a motion for new trial is reviewed for an abuse of discretion. *Mechura, supra*, 205 Mich App at 483.

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

MCR 6.425(D) Sentencing; imposition of sentence

MCR 6.425(E) Advice concerning right to appeal

MCL 769.1 *et seq*. Code of criminal procedure; judgment and sentence

MCL 771.14 Presentence investigation report

A. Presentence Investigation Report (PSIR)

A presentence investigation report is required for felony cases. MCL 771.14(1). The PSIR cannot be waived. *People v Brown,* 393 Mich 174, 179 (1974); *People v Hemphill*, 439 Mich 576, 581 (1992). For the content required in a PSIR and challenges to that content, see MCL 771.14 and MCR 6.425(A)–(D). The victim's written statement shall be included in the PSIR if requested by the victim. MCL 780.764. The court should confirm that the parties have read the PSIR and determine whether there are any corrections, additions or deletions to be made to the report. MCR 6.425(D)(2). Corrections

are governed by MCL 771.14(5) and MCR 6.425(D)(3). The PSIR should be retyped if significant changes are made.

A probation agent may use undisputed facts to draw conclusions included in a defendant's PSIR. See *People v Wybrecht*, 222 Mich App 160, 173 (1997).

Once a defendant challenges the accuracy of the information in the presentence report, the trial court has an obligation to respond to that challenge. *People v Spanke*, 254 Mich App 642, 648 (2003). The court "may determine the accuracy of the information, accept the defendant's version, or simply disregard the challenged information." *Id*. If the court elects to determine the accuracy of the information, the prosecutor must prove the facts asserted by a preponderance of the evidence. *People v Ratkov (After Remand)*, 201 Mich App 123, 125 (1993).

B. Sentencing Guidelines

MCL 769.34 Application of sentencing guidelines; exceptions; appeals of sentences

MCL 777.1 *et seq.* Code of criminal procedure; sentencing guidelines

The proper minimum sentence range for an offense to which the sentencing guidelines apply is determined by properly scoring the appropriate offense variables (OVs) and prior record variables (PRVs) for a specific conviction. MCL 769.34(2); MCR 6.425(D)(1). In addition to any objections to the content of a defendant's PSIR, the court should determine whether there are any objections to the guidelines scoring. MCR 6.425(D)(1).

The court must use the sentencing guidelines when sentencing* for felony offenses committed on or after January 1, 1999. MCL 769.34(2); *People v Hegwood*, 465 Mich 432, 438 (2001). Reasons for departure from the guidelines must be articulated on the record by the court at the time of sentencing. MCL 769.34(3). The sentencing court must specifically articulate substantial and compelling reasons for a departure from the guidelines by reference to objective and verifiable factors. *People v Babcock*, 469 Mich 247, 257–259 (2003).

*A script and checklist for felony sentencing is in the Appendix.

A sentence within the guidelines shall be affirmed on appeal, absent an error in scoring the guidelines or the use of inaccurate information relied on in sentencing the defendant. MCL 769.34(10). In cases of departures, the Legislature requires the court to have a substantial and compelling reason for the departure not already taken into account by the guidelines. MCL 769.34(11). The substantial and compelling reasons must be objective and verifiable. *Babcock*, *supra*, 469 Mich at 257.

In determining whether there are "substantial and compelling" reasons the court should consider: (1) mitigating circumstances surrounding the offense, (2) the defendant's prior record, (3) the defendant's age, and (4) the

defendant's work history. It is also proper to consider factors that arose after the defendant's arrest, such as the defendant's cooperation with law enforcement officials. *People v Fields*, 448 Mich 58, 69, 80 (1995). See also *Daniel*, *supra*, 462 Mich at 7; *Babcock*, *supra*, 469 Mich at 283–284.

The sentencing guidelines alone are not a substantial and compelling reason to depart from a mandatory minimum sentence, but may suggest the magnitude of the departure if there are substantial and compelling reasons to depart from the mandatory minimum. *People v Izarraras-Placante*, 246 Mich App 490, 498–499 (2001).

Appellate review of a trial court's departure is not de novo but is something less deferential than an abuse of discretion. As long as the trial court has reached a decision that falls among a group of "principled outcomes" the appellate court may properly defer to the trial court's exercise of discretion. *People v Reincke (On Remand)*, 261 Mich App 264, 267–268 (2004).

C. Allocution

The Michigan Rules of Evidence do not apply to sentencing proceedings. MRE 1101(3); *People v Hodson*, 178 Mich App 406, 413 (1989).

The defendant, the prosecution, and defense counsel have the right to address the court before sentence is imposed. MCR 6.425(D)(2)(c).

While the trial judge need not specifically ask the defendant if he or she has anything to say on his or her own behalf before sentencing, it is the author's view that a direct question to the defendant is the best course of action. See *People v Petit*, 465 Mich 624, 628 (2002).

The victim must be given an opportunity to advise the court of any circumstances he or she believes the court should consider in imposing sentence. MCR 6.425(D)(2)(c). The court also has discretion to allow a non-party to address the court at sentencing. *People v Albert*, 207 Mich App 73, 75 (1994).

It is not prudent to hold a sentence conference with counsel, unless the defendant is present. See *People v Pulley*, 411 Mich 523, 528–532 (1981).

D. Imposition of Sentence

The court may make comments based on the presentence investigation report. MCR 6.425(D)(2)(e). The court should state the reasons for the sentence: punishment, rehabilitation, to protect society, deterrence, etc. *People v Snow*, 386 Mich 586, 592–594 (1972); *People v Coles*, 417 Mich 523, 549–550 (1983).

The court should state if the sentence is within the sentencing guidelines. The court should advise the defendant if the sentence is a departure from the guidelines and inform the defendant that he or she can appeal the departure. MCL 769.34(7). A sentence within the guidelines is presumptively proportionate. *People v Milbourn*, 435 Mich 630 (1990).

Absent a departure, the court should impose on the defendant the sentence recommended in the defendant's PSIR. MCR 6.425(D)(2)(d) requires the court to "state the sentence being imposed, including the minimum and maximum sentence if applicable, together with any credit for time served to which the defendant is entitled."

Give credit for time in jail if appropriate. MCL 769.11b (credit for time served because of lack of bond). See MCL 750.195(2), MCL 768.7a; MCL 768.7b for exceptions.

Determinate jail sentences, with or without probation, are proper penalties under the sentencing guidelines as intermediate sanctions. *People v Martin*, 257 Mich App 457, 460–462 (2003); MCL 750.506; MCL 769.8.

1. Minimum and Maximum Prison Sentences

The court must state both the minimum and maximum sentence. MCL 769.8; MCL 769.9. The maximum sentence is the statutory maximum. The minimum sentence cannot be more than two-thirds of the maximum sentence. *People v Tanner*, 387 Mich 683, 690 (1972). The *Tanner* rule is now statutory. MCL 769.34(2)(b).

There must be a reasonable prospect that the defendant can actually serve an indeterminate sentence less than life, but there is no requirement that a defendant must have an opportunity for parole eligibility before he reaches a certain age. *People v Moore*, 432 Mich 311, 328 (1989); *People v Moore (On Remand)*, 188 Mich App 244, 245 (1991). See also *People v Lemons,* 454 Mich 234, 260 (1997), where the Court affirmed a 60- to 90-year sentence for a 45-year-old defendant.

2. Consecutive and Concurrent Sentences

Absent statutory authority for imposing a consecutive sentence, a concurrent sentence is required. *People v Sawyer*, 410 Mich 531, 534 (1981). A presentence investigation report shall include a statement prepared by the prosecuting attorney as to whether consecutive sentencing is required or authorized by law. MCL 771.14(2)(d). The judge is required to specify in the judgment of sentence whether the sentence is concurrent or consecutive. MCL 769.1h. Consecutive sentencing is mandatory for certain offenses, but discretionary for others. Mandatory consecutive sentences are required for offenses committed on parole, MCL 768.7a, escape, MCL 750.193, 750.195, 750.197, and major drug offenses, MCL 333.7401(3). Mandatory consecutive sentencing may also apply to jail

sentences. See *People v Spann*, 250 Mich App 527, 529 (2002), aff'd 469 Mich 898 (2003).

Sentences for felon-in-possession and felony-firearm should run concurrent to each other where the offenses are based on predicate felonies for which the sentences are consecutive to the sentences for felon-in-possession and felony-firearm. MCL 750.277b(2); *People v Clark*, 463 Mich 459, 463–464 (2000).

3. Habitual Offenders

*For more information, see Section 4.55.

The court has discretion in setting both the minimum and maximum sentence under the habitual offender statutes.* The minimum cannot exceed two-thirds of the *statutory* maximum. MCL 769.34(2)(b); *People v Powe*, 469 Mich 1024 (2004). See also *People v Thomas*, 447 Mich 390, 392 (1994).

Habitual offender provisions are found at MCL 769.10, MCL 769.11 and MCL 769.12. These provisions increase the statutory maximum for offenses depending on the defendant's number of prior felony convictions. The maximum sentence for a person convicted of a second felony may be increased by 50 percent. The maximum sentence for a third felony may be doubled. A person convicted of a fourth felony may be sentenced to 15 years or life imprisonment, depending on the statutory maximum of the sentencing offense. If the statutory maximum is less than five years, habitual offender provisions permit a sentence of 15 years. If the statutory maximum is more than five years, the habitual offender provisions permit a sentence of life imprisonment.

The habitual offender sentence is discretionary and the court should always mention the enhanced sentence is discretionary. *People v Bewersdorf*, 438 Mich 55, 66 (1991).

4. Probation

Probation is governed by MCL 771.1 *et seq*. Conditions that may be imposed on a defendant's term of probation are listed at MCL 771.3.

5. Plea Under Advisement

*See Section 4.56 for more information on HYTA.

Pleas can be "taken under advisement" under the Holmes Youthful Trainee Act (HYTA),* MCL 762.11 *et seq.,* and under Section 7411 of the Public Health Code, MCL 333.7411.

6. Delayed Sentence

*See Section 4.56.

A sentence can be delayed for up to one year; after one year the court loses jurisdiction.* MCL 771.1. The defendant may consent to an additional delay. *People v Richards*, 205 Mich App 438, 445 (1994).

A sentencing court is required by court rule to date and sign a written judgment of sentence within seven days after sentencing a defendant; a court's failure to comply with the requirement does not divest the court of jurisdiction to enforce the sentence. MCR 6.427. *People v Levandoski*, 237 Mich App 612, 617 (1999).

A defendant's right to due process under the Fifth Amendment may be violated where the delay is caused by the government's own affirmatively improper or grossly negligent conduct. *Levandoski, supra* at 622.

7. Work Release for Jail Sentence

Order, recommend, or leave to Sheriff. Certain offenders are not eligible for work release (such as CSC). MCL 801.251(2).

8. Fines and Costs

Fines, costs, and other financial obligations imposed by the court must be paid at the time of assessment, except when the court allows otherwise for good cause shown. MCR 1.110. A criminal defendant may be required to pay costs only where such a requirement is expressly authorized by statute. *People v Jones*, 182 Mich App 125, 126 (1989).

9. Restitution

Victims have a constitutional right to restitution. Const 1963, art 1, §24. Because restitution is constitutionally mandated, it is not a factor involved in sentence bargaining. *People v Ronowski*, 222 Mich App 58, 61 (1997). The court should order full restitution* if appropriate. MCR 6.425(D)(2)(f); MCL 780.766(2).

*For detailed information on restitution, see Miller, *Crime Victim Rights Manual* (MJI, 2001), Chapter 10.

Restitution is "specifically designed to allow crime victims to recoup losses suffered as a result of criminal conduct." *People v Grant*, 455 Mich 221, 230 (1997). Restitution can be ordered for all victims of a defendant's conduct, even though the specific criminal acts committed against some of the victims were not the basis for the defendant's conviction. *People v Gahan*, 456 Mich 264, 272 (1997). What constitutes the "course of conduct" for which restitution is required under MCL 771.3(e) should be given broad meaning. *Gahan*, *supra*, 456 Mich at 272.

The court need not inquire about a defendant's ability to pay unless the defendant raises the question. *People v Music*, 428 Mich 356, 361–362 (1987). A hearing on the amount of restitution is not required unless there is a question about the amount. See *People v Grant*, 455 Mich 221, 225 (1997).

Where the trial court conditioned the suspension of some of the defendant's jail time on his payment of restitution, the defendant's equal protection rights were violated. Unless a defendant's failure to pay was wilful, a sentence that exposes an offender to incarceration unless he or she pays restitution or another fine violates the state and federal

constitutions because it results in unequal punishments for offenders who have and do not have sufficient money. *People v Collins*, 239 Mich App 125, 135 (1999).

Where a prisoner seeks a writ of mandamus challenging the withdrawal of restitution payments from his prison account, the claim lacks merit because the restitution is payable immediately and the prisoner should have challenged its imposition at the time of sentencing. *White-Bey v Dep't of Corrections*, 239 Mich App 221, 225–226 (2000).

10. Jail Credit

See Section 4.59.

E. Resentencing

A court may correct an invalid sentence, but a valid sentence cannot be modified except as provided by law. MCR 6.429(A); *People v Wybrecht*, 222 Mich App 160, 166–167 (1997). Resentencing requires a showing that the sentence was invalid. *People v Harris*, 224 Mich App 597, 601–602 (1997). Absent a legal or procedural error, the trial court cannot alter a sentence that the defendant has begun to serve. *Wybrecht*, *supra* at 167. See also *People v Moore,* 468 Mich 573, 579 (2003).

F. Appeal Rights

MCR 6.625 makes no distinction between appeals based on convictions by plea or verdict. MCR 6.625 further provides:

> "An indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere is entitled to the assistance of assigned appellate counsel at public expense if the prosecution seeks leave to appeal or the Court of Appeals or the Supreme Court grants the defendant's application for leave to appeal."

Michigan law does not provide an appeal of right to defendants convicted by plea. Appeal from a plea-based conviction is by application for leave to appeal. MCL 770.3(1)(d). See also MCR 6.302(B)(5)–(6) and proposed amendments to MCR 6.302(B). Coupled with MCL 770.3a(1), a statute that—with certain specific exceptions—expressly denies the appointment of appellate counsel to defendants convicted on the basis of guilty pleas, indigent defendants are frequently unable to obtain the assistance of counsel to pursue discretionary appeals. The Michigan Supreme Court approved of these statutory provisions in *People v Bulger*, 462 Mich 495, 499, 504 (2000), when the Court ruled that the state constitution did not require that an indigent defendant be appointed counsel to pursue a discretionary appeal. The Court of Appeals for the Sixth Circuit has concluded that portions of MCL 770.3a are unconstitutional:

> "Michigan's statute creates . . . a different opportunity for access to the appellate system based upon indigency. As applied, the statute violates the due process provision of the Fourteenth Amendment to the United States Constitution, and is thus unconstitutional." *Tesmer v Granholm*, 333 F3d 683, 701 (CA 6, 2003).*

*The United States Supreme Court has granted certiorari in this case. *Kowalski v Tesmer*, ___ US ___ (2004).

A defendant may not appeal a plea-based conviction on grounds related to the prosecution's capacity to prove the defendant's factual guilt—an appellate challenge to the state's evidence against the defendant is subsumed by a defendant's guilty plea. *People v New*, 427 Mich 482, 491 (1986). The same is true for a defendant's appeal of a conviction based on a plea of nolo contendere:

> "Since a plea of nolo contendere indicates that a defendant does not wish to contest his factual guilt, any claims or defenses which relate to the issue of factual guilt are waived by such a plea. Claims or defenses that challenge a state's capacity or ability to prove defendant's factual guilt become irrelevant upon, and are subsumed by, a plea of nolo contendere. . . . . Only those defenses which challenge the very authority of the state to prosecute a defendant may be raised on appeal after entry of a plea of nolo contendere [footnote omitted]." *New*, *supra* at 493.

For offenses over which a circuit court has jurisdiction, where a plea is withdrawn or vacated, a case may proceed to trial on any charges previously brought against the defendant or on any charges that could have been brought against the defendant if he or she had not entered a plea. MCR 6.312.

A defendant may waive his or her right to appeal from a plea-based conviction in exchange for sentencing or charging concessions. *People v Cobbs*, 443 Mich 276, 285 (1993).

G. Standard of Review

A trial court's sentencing decision is reviewed for an abuse of discretion. *People v Williams*, 223 Mich App 409, 410 (1997).

> "At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. . . . When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes." *Babcock, supra*, 469 Mich at 269.

Appellate review of sentences imposed under the statutory guidelines has focused on the scoring of the guidelines and the reasons for departures from the guidelines. The trial court's scoring of a sentencing guidelines variable is reviewed for clear error. *People v Witherspoon*, 257 Mich App 329, 334–335 (2003). A scoring decision is not clearly erroneous if the record contains any evidence in support of the decision. *Witherspoon, supra* at 335.

The existence of a particular factor articulated in support of a departure is reviewed for clear error, the determination whether a factor is objective and verifiable is reviewed as a matter of law, and a trial court's determination that the objective and verifiable factors in a particular case constitute substantial and compelling reasons to depart from the guidelines is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264–265 (2003).

Under the statutory sentencing guidelines, scoring errors are reviewable on appeal if challenged at sentencing. MCL 769.34(10). MCR 6.429(C) was amended to conform with the preservation requirements of the statute.

See also *People v McGuffey,* 251 Mich App 155, 165–166 (2002); *People v Kimble*, 470 Mich 305, 311 (2004).

4.55 Sentencing—Habitual Offender

MCR 6.112 The information or indictment

MCR 6.425 Sentencing

MCL 769.10 Subsequent felony

MCL 769.11 Subsequent felony of person convicted of 2 or more felonies

MCL 769.12 Subsequent felony of persons convicted of 3 or more felonies; prisoner subject to disciplinary time

MCL 769.13 Notice of intent to seek enhanced sentence

A. Notice Required

MCL 769.13 requires the prosecution to file a supplemental information identifying a defendant as an habitual offender within 21 days of arraignment. The prosecution may not subsequently amend that supplemental information to allege additional prior convictions. *People v Ellis*, 224 Mich App 752, 756–757 (1997); *People v Morales*, 240 Mich App 571, 583 (2000). The supplemental information may be amended outside the statutory period to correct mistakes within it. See *People v Ellis*, 224 Mich App 752, 757 (1997) and *People v Hornsby*, 251 Mich App 462, 472 (2002).

MCR 6.112(F) requires that notice of the prosecutor's intent to seek an enhanced sentence pursuant to MCL 769.13 must include a list of the prior convictions that may be relied on for purposes of sentence enhancement.

B. Discretionary Enhancement

When sentencing a defendant as an habitual offender, the trial court should always mention that the enhanced sentence (minimum and maximum) is discretionary. MCL 769.10 *et seq.*; *People v Bewersdorf,* 438 Mich 55, 66 (1991); *People v Turski*, 436 Mich 878 (1990); *People v Hansford (After Remand)*, 454 Mich 320, 323 (1997); *People v Mauch*, 23 Mich App 723, 730 (1970). However, an habitual offender sentence is subject to the rule that the minimum term may not exceed two-thirds of the maximum. *People v Wright*, 432 Mich 84, 85–86 (1989). A sentence cannot be enhanced both under the habitual offender statute and the repeat controlled substance offense statute. *People v Fetterley*, 229 Mich App 511, 540 (1998).

The court can sentence directly under the habitual offender statute rather than first sentencing on the underlying offense, vacating the first sentence, and resentencing. MCL 769.11(2); *People v Hardin*, 173 Mich App 774, 778 (1988).

C. Scoring the Sentencing Guidelines

The statutory guidelines apply to offenses committed on and after January 1, 1999. MCL 769.34(2). Complete the SIR for habitual offenders and reference the minimum ranges listed for habitual offenders in the appropriate sentencing grid.

D. Proof of Prior Convictions

The court determines the existence of prior convictions for the purpose of determining whether a defendant is an habitual offender, and the defendant is not entitled to a jury trial on the matter. *People v Zinn,* 217 Mich App 340, 345 (1996).

An attack on a defendant's prior convictions can only be made based upon lack of counsel when a right to counsel existed. A defendant's habitual offender status must not be based on previous felony convictions that are constitutionally infirm. *People v Hannan (After Remand)*, 200 Mich App 123, 128 (1993); *People v Ingram*, 439 Mich 288, 296–302 (1992).

E. Standard of Review

An habitual offender's sentence is reviewed for an abuse of discretion. *People v Cervantes*, 448 Mich 620, 627 (1995).

4.56 Sentencing—Deferred, Delayed, and Diversionary

MCL 333.7411 Probation of individual with no previous conviction; entering adjudication of guilt upon violation of probation; discharge and dismissal without adjudication of guilt; nonpublic record of arrest and discharge and dismissal; etc.

MCL 750.350a(4) Taking or retaining child by adoptive or natural parent; intent; violation as felony; penalty; restitution for financial expense; effect of pleading or being found guilty; probation; discharge and dismissal; nonpublic record; defense.

MCL 762.11 *et seq.* Holmes Youthful Trainee Act (HYTA)

MCL 771.1(2) Requirements for probation; delayed sentence; fee; applicability of section to certain juveniles

A. Delay of Sentencing Up to One Year

In a case where the defendant is eligible for probation,

> "the court may delay sentencing the defendant for not more than 1 year to give the defendant an opportunity to prove to the court his or her eligibility for probation or other leniency compatible with the ends of justice and the defendant's rehabilitation. When sentencing is delayed, the court shall enter an order stating the reason for the delay upon the court's records. The delay in passing sentence does not deprive the court of jurisdiction to sentence the defendant at any time during the period of delay." MCL 771.1(2).

If the court delays sentencing under this provision, it shall include in the delayed sentence order a supervision fee as provided by MCL 771.1(3).

B. Holmes Youthful Trainee Act (HYTA)

The grant of relief under MCL 762.11 (HYTA) is discretionary. *People v Gow*, 203 Mich App 94, 96 (1993). The statute is remedial and should be construed liberally. *People v Trinity*, 189 Mich App 19, 21 (1991), and *People v Fitchett*, 96 Mich App 251, 253 (1980). An individual may avail himself or herself of the provisions in HYTA on more than one occasion; the statutory language does not preclude HYTA from applying to an individual who has previously been granted youthful trainee status.

1. Generally

MCL 762.11 provides in part:

> "If an individual pleads guilty to a charge of a criminal offense, other than a felony for which the maximum punishment is life imprisonment, a major controlled substance offense, or a traffic offense, committed on or after the individual's seventeenth birthday but before his or her twenty-first birthday, the court of record having jurisdiction of the criminal offense may, without entering a judgment of conviction and with the consent of that individual, consider and assign that individual to the status of youthful trainee."

2. Guilty Plea Required

A defendant found guilty as a result of a trial does not qualify for youthful trainee status because a guilty plea is required. *People v Dash*, 216 Mich App 412, 414 (1996). A no contest plea would also preclude relief since it is not a plea of "guilty." *People v Harns*, 227 Mich App 573, 580 (1998), vacated in part 459 Mich 892 (1998).

3. Offenses Excluded

Felonies punishable by life imprisonment, major controlled substance offenses, and traffic offenses are specifically excluded by the statute. Major controlled substance offenses are defined at MCL 761.2 and the traffic offenses excluded are those covered by MCL 257.1 to MCL 257.923 (or a substantially corresponding ordinance).

4. Age of Defendant at Time of Offense

The defendant must be pleading guilty to an offense which occurred after his or her seventeenth birthday and before his or her twenty-first birthday.

5. Procedure

The plea is taken under advisement. If the "sentence" is successfully completed, the case is dismissed. In cases where the sentence is successfully completed, the individual's record is closed to public inspection but a nonpublic record of the case is available to the courts, the Department of Corrections, the Family Independence Agency, and law enforcement personnel. MCL 762.14(4).

If the HYTA status is revoked, the plea should be accepted. MCL 762.12 addresses revocation of Youthful Trainee Status.

6. Terms of HYTA Sentence

MCL 762.13 covers the terms of a HYTA sentence. For a felony, the sentence can include probation of up to three years, MCL 762.13(1)(c), and a jail term of up to one year, MCL 762.13(1)(b).

The HYTA does not exempt a juvenile from registering as a sex offender. *People v Rahilly*, 247 Mich App 108, 115 (2001).

C. § 7411 Sentence Under the Public Health Code

The process used for a Section 7411 sentence is essentially the same as that used for a HYTA sentence. See MCL 333.7411. However, an individual can receive only one discharge and dismissal under Section 7411. MCL 333.7411(1). Section 7411 is also limited to individuals who have not previously been convicted of a drug offense. *Id*. This provision does not preclude a Section 7411 sentence for a defendant who has a simultaneous drug conviction. *People v Ware*, 239 Mich App 437, 442 (2000).

D. Delayed Sentencing—Taking/Retaining Child by Adoptive/Natural Parent

In a "parental kidnapping" case, if there has been no prior conviction involving kidnapping, the court may defer the proceedings with the consent of the accused parent. MCL 750.350a(4). Under this process, the accused parent is placed on probation and if the parent fulfills the terms and conditions of probation, the parent is discharged and the proceedings dismissed. *Id*. The dismissal is without an adjudication of guilt. *Id*.

E. Standard of Review

The trial court's decision whether to sentence under the Holmes Youthful Trainee Act is reviewed for abuse of discretion. *People v Teske*, 147 Mich App 105, 109 (1985).

The statutory language of MCL 333.7411 indicates that the trial court has discretion whether to sentence under Section 7411; therefore, the court's decision is reviewed for an abuse of discretion.

4.57 Sentencing—Juvenile*

*See Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings—Revised Edition,* (MJI, 2003).

MCR 6.901 Rules applicable to juveniles charged with specified offenses; precedence, scope

MCR 6.933 Juvenile probation revocation

MCL 712A.2d Juvenile tried as adult

MCL 712A.4 Juvenile waiver

MCL 712A.18 Order of disposition for juvenile

MCL 769.1(3) Sentencing a juvenile when adult sentencing is not required

The circuit court may have jurisdiction over individuals between and including the ages of 14 to 17 years under MCL 600.606 or as a result of a juvenile court waiver under MCL 712A.4.

A court considering a juvenile disposition, adult sentence, or blended sentence for a juvenile defendant must logically articulate on the record why it has chosen one alternative over the other two in light of the six statutory criteria. MCL 712A.18; *People v Petty*, 469 Mich 108, 117–118 (2003).

A. Sentencing Hearing

Where there is a request to sentence a juvenile as an adult, both the statute and court rule require a hearing to determine whether it is in the best interest of the public to sentence the juvenile as a juvenile. MCL 769.1(3) and MCR 6.931(C). The burden of proof is on the prosecuting attorney to establish by a preponderance of the evidence the best interest of the public would be served by sentencing the juvenile as though the juvenile were an adult offender. MCR 6.931(E)(2). The court must consider the criteria set forth in both the statute and court rule. MCL 769.1(3)(a)–(f); MCR 6.931(E)(4)(a)–(f). The court must make specific findings of fact and conclusions of law forming the basis of its decision. MCL 769.1(6); MCR 6.931(E)(5). The findings must cover each of the statutory factors. *People v Hazzard*, 206 Mich App 658, 659 (1994). With the consent of the prosecutor and the defendant, the court may waive a hearing if the juvenile is going to be sentenced as a juvenile. MCL 769.1(4) and MCR 6.931(B).

A traditionally waived juvenile is not entitled to a juvenile sentencing hearing. *People v Williams*, 245 Mich App 427, 436 (2001).

B. Sentencing Procedure

In addition to the usual steps which take place at sentencing, there are specific steps that must be covered when sentencing a juvenile. MCL 769.1(6)–(11); MCR 6.931(F). There is a SCAO-approved form (Order Committing Juvenile to Department of Social Services, CC 236) that can be used as a checklist for the sentencing requirements. It roughly follows the statute and MCR 6.931(F). The court should take particular care to advise the juvenile that, if, while on probation, he or she is convicted of a felony or misdemeanor punishable by more than one year's imprisonment, the court must revoke juvenile probation and sentence the juvenile to a term of years in prison not to exceed the penalty that might have been imposed for the offense for which the juvenile was originally convicted. MCR 6.931(F)(2); *People v Stanley*, 207 Mich App 300, 307 (1994). The court should recommend a placement for the juvenile. The court also has the authority to order restitution for attorney fees and to require reimbursement for his or her care.

C. Retention of Jurisdiction

The court retains jurisdiction of the juvenile after sentencing if he or she is sentenced as a juvenile. MCL 769.1(10). The court must conduct a semi-annual progress review of the juvenile. MCR 6.935. The statute requires an annual review. MCL 769.1(11).

D. Commitment Review Hearing

The court is required to schedule a commitment review hearing within 42 days before the juvenile obtains age 19, unless adjourned for good cause. This procedure is governed by MCR 6.937.

E. Probation Revocation

Probation revocation for a juvenile is governed by court rule. MCR 6.933; MCR 6.445.

F. Standard of Review

A trial court's findings of fact at a juvenile sentencing hearing are reviewed for clear error, while the ultimate decision whether to sentence a minor as a juvenile or as an adult is reviewed for an abuse of discretion, using the principle of proportionality. *People v Thenghkam*, 240 Mich App 29, 41–43 (2000).

4.58 Sentencing—Sexually Delinquent Person

MCL 750.10a Definition of sexually delinquent person

A. Definition

MCL 750.10a provides:

> "The term 'sexually delinquent person' when used in this act shall mean any person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others, or by the use of force upon another person in attempting sex relations of either a heterosexual or homosexual nature, or by the commission of sexual aggressions against children under the age of 16."

B. Determination

The information must allege the defendant is a sexually delinquent person. *People v Helzer*, 404 Mich 410, 425 (1978).

Before sentencing a defendant accused of sexual delinquency, the court must "conduct an examination of witnesses relative to the sexual delinquency of such person and may call on psychiatric and expert testimony." MCL 767.61a. All testimony must be taken in open court and a transcript must be made and filed with the record of the case. *Id*.

A sexual delinquency charge must not be mentioned during a defendant's trial for the principal charge. *Helzer, supra*, 404 Mich at 426. A separate jury decides sexual delinquency charge. *Helzer, supra* at 422. The prosecutor must establish beyond a reasonable doubt the defendant's status as a sexual delinquent. *Helzer, supra* at 417. The prosecutor may offer expert testimony. The court shall provide an expert for an indigent defendant at his or her request. MCL 767.61a.

C. Application

A sentence imposed on the basis of a defendant's sexual delinquency is an alternative sentence to the one permitted for the principal offense charged. *Helzer, supra* at 419; *People v Kelly*, 186 Mich App 524, 528 (1990). If the court sentences a defendant as a sexual delinquent, the court must impose a sentence where the minimum term is one day and the maximum term may be life imprisonment. *Kelly, supra* at 529.

Sexually Delinquent Person sentencing applies to the following offenses:

- MCL 750.158 (Sodomy)
- MCL 750.335a (Indecent Exposure)
- MCL 750.338 (Gross Indecency—Males)
- MCL 750.338a (Gross Indecency—Females)
- MCL 750.338b (Gross Indecency—Male-Female)

4.59 Sentencing—Jail Credit

MCL 769.11b Credit for time served prior to sentence because of lack of bond

A. Generally

A defendant is entitled to jail credit for the time he or she served in jail before sentencing because he or she could not post bond. MCL 769.11b. The credit

may not apply if a defendant starts serving a sentence on another conviction before being sentenced for the offense for which the defendant could not post bond. See *People v Givans*, 227 Mich App 113, 125–126 (1997).

A defendant who posts bond for one offense and is subsequently arrested for one or more new offenses is not entitled to credit against the first sentence for the time spent in jail on the new offenses. This is true both when the defendant is serving a sentence for the second offense and when the defendant is serving pre-trial incarceration for the second offense, so long as bond was posted for the first offense. See *People v Prieskorn*, 424 Mich 327, 340 (1985).

Jail credit is governed by a strict standard. A defendant incarcerated outside of Michigan is not entitled to jail credit unless the time is spent for the offense of which he or she is convicted. *People v Adkins*, 433 Mich 732, 742 (1989). *Adkins*, *supra*, did recognize that trial judges always have discretion to grant sentence credit for time served on an unrelated offense if the court feels it is appropriate. *Id.* at 751 n 10.

There is some support for an argument that jail credit is appropriate for multiple offenses when bond is never posted. See *Givans*, *supra*, 227 Mich App at 125. A defendant who is incarcerated for multiple offenses and pleads guilty to the charge with a lesser amount of jail credit is not entitled to jail credit for time spent on the charges dismissed as part of the plea bargain. *People v McKnight*, 165 Mich App 66, 70 (1987).

B. Tether, Boot Camp, or Rehabilitation Programs

Jail credit is required for time spent in the boot camp program. *People v Hite (After Remand)*, 200 Mich App 1, 8 (1993). However, time spent on tether or in a rehabilitation program does not equal time in "jail" for which credit is required. *People v Scott*, 216 Mich App 196, 200 (1996); *People v Reynolds,* 195 Mich App 182, 184 (1992); *People v Whiteside*, 437 Mich 188, 202 (1991).

An individual is not entitled to credit for home confinement. *People v Smith*, 195 Mich App 147, 152 (1992). However, many counties will grant credit if the defendant successfully completes a residential rehabilitation program.

A defendant is entitled to time served where he or she spent time at a forensic center. MCL 330.2042.

C. Arrested Parolees

If the defendant is on parole in Michigan when he or she commits a new crime, any time spent in jail after arrest is credited against the previous sentence, not the sentence imposed for the subsequent offense. *People v Watts*, 186 Mich App 686, 688 (1991). The new sentence term begins on the date of sentencing.

A parolee held on a parole detainer is not entitled to credit against a sentence imposed for a new offense. *People v Stewart*, 203 Mich App 432, 433 (1994).

Where the defendant argued he was entitled to credit against a prison sentence imposed in a foreign jurisdiction for time spent in jail following his arrest for a parole violation in Michigan, the Michigan Court of Appeals concluded it was bound by *People v Johnson*, 205 Mich App 144, 146–147 (1994) (where the trial court ruled that a defendant on parole from a foreign jursidiction was entitled to credit against the Michigan sentence because the court was without jurisdiction to credit the sentence imposed in the foreign jurisdiction). *People v Seiders (Seiders I)*, 259 Mich App 538, 541–542 (2003).

Both *Seiders* and *Johnson* involve defendants on parole from convictions in other states, and both cases involve MCL 769.11b, which expressly applies to credits gained for time spent in jail "prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted...." In *Seiders I*, the defendant asserted that MCL 769.11b entitled him to a sentence credit because the Michigan court was without jurisdiction to credit the sentence imposed against him in another state. Thus, the defendant argued, the credit must be given against the sentence imposed for his Michigan conviction. *Seiders I*, *supra* at 540.

The *Seiders I* Court disagreed with the defendant and explained that MCL 769.11b did not apply to the defendant's pretrial incarceration because he was in custody on a parole detainer, a status for which bond is neither set nor denied. *Seiders I*, *supra* at 541. The Court also indicated that MCL 769.11b did not apply to the circumstances of the defendant's situation in *Johnson*; according to the *Seiders I* Court, the statute should not have been considered by the *Johnson* Court in its decision. *Seiders I*, *supra* at 541–542. Notwithstanding the Court's disagreement with *Johnson*, *supra*, the Court considered itself bound by the decision and ruled accordingly.

A conflict resolution panel concluded that *Johnson, supra*—the case by which the *Seiders I* panel was bound—was wrongly decided. *Seiders I* was vacated in part by *People v Seiders (Seiders II)*, 259 Mich App 801 (2004). The conflict resolution panel agreed with the *Seiders I* panel's analysis of the applicable statutory language and affirmed the trial court's refusal to credit the defendant's sentence with time served as a parole detainee on a sentence he received in a foreign jurisdiction. *People v Seiders (Seiders III)*, 262 Mich App 702, 705 (2004).

According to the *Seiders III* Court:

> "A defendant is only entitled to a sentencing credit under MCL 769.11b if he has been '*denied or unable to furnish bond.*'" MCL 769.11b (emphasis added). As the *Seiders* [*I*] Court noted, bond is neither set nor denied when a defendant is held in jail on a parole detainer. Apparently, the *Johnson* Court did not consider the fact that the defendant was incarcerated due to a parole detainer.

Because defendant was held on a parole detainer, the question of bond is not an issue, and MCL 769.11b does not apply. *Seiders* [*I*], *supra* at 541." *Seiders III*, *supra*, 262 Mich App at 707.

D. Void Sentences

Time served under a void sentence should be credited against the new, valid sentence. *People v Lyons (After Remand),* 222 Mich App 319, 321 (1997). See also *People v Harding,* 443 Mich 693, 715 n 25 (1993).

E. Consecutive Sentences

If a new sentence is made consecutive, no jail credit is required. *People v Connor,* 209 Mich App 419, 431 (1995); *People v Alexander (After Remand),* 207 Mich App 227, 228 (1994).

F. Sheriff's Disciplinary Credit

If a defendant serves ten months on a one-year jail sentence because of good time credits, he or she is entitled to 365 days jail credit for any subsequent violation of probation. *People v Resler,* 210 Mich App 24, 28 (1995).

G. No Credit for Time Served Before Arrest

A defendant is not entitled to time served before arrest on a new offense where he or she was erroneously incarcerated on a previous sentence. *People v Ovalle,* 222 Mich App 463, 468–469 (1997).

H. Credit for Time Spent Erroneously at Liberty

There may be instances where a defendant should receive credit for time he or she was not incarcerated but should have been, where the defendant's liberty was due to government error and the delay in executing the defendant's sentence was unreasonable. *People v Levandoski,* 237 Mich App 612, 621 n 5 (1999).

I. Standard of Review

Jail credit can be reviewed on appeal despite the absence of objection. *Connor, supra,* 209 Mich App at 431. The standard of review is de novo. *People v Givans,* 227 Mich App 113, 124 (1997). **Note:** At least two defendants have lost jail credit on appeal. *People v Heim,* 206 Mich App 439, 442–443 (1994) (on the prosecutor's cross-appeal based on the trial court's computation of credit that erroneously included credit for days spent in jail serving a sentence imposed for a different offense); *Connor, supra,* 209 Mich App at 431–432 (the defendant was wrongly credited with time served for his

escape conviction when the sentence for that offense was mandated to run consecutive to the defendant's initial sentence).

4.60 Probation Violation

MCL 771.4 Probation; revocation; procedure; sentencing; applicability to juveniles

MCR 6.445 Probation revocation

A. Issuance of Summons or Warrant

Upon a finding of probable cause that a condition of probation has been violated, the court may issue a summons or warrant for the arrest of the probationer.* MCR 6.445(A)(1)–(2); MCR 6.103. The probationer must be promptly arraigned upon arrest. MCR 6.445(A).

*See *Criminal Procedure Monograph 7: Probation Revocation*, (MJI, 2002).

B. Arraignment

At arraignment,* the court must ensure that the probationer received written notice of the alleged violation and is advised of the right to contest the charge at a hearing and the right to a lawyer's assistance at the hearing, including the appointment of counsel at public expense if the probationer cannot afford to retain counsel. MCR 6.445(B)(1)–(3).

*A checklist and script for conducting a probation violation arraignment may be found in the Appendix.

MCR 6.445(C) provides:

> "(C) Scheduling or Postponement of Hearing. The hearing of a probationer being held in custody for an alleged probation violation must be held within 14 days after the arraignment or the court must order the probationer released from that custody pending the hearing. If the alleged violation is based on a criminal offense that is a basis for a separate criminal prosecution, the court may postpone the hearing for the outcome of that prosecution."

The court has a continuing duty to advise the probationer of the right to the assistance of lawyer at each subsequent proceeding and "must comply with the advice and waiver procedure in MCR 6.005(E)." MCR 6.445(D). A probation violation is waived if the probation officer does not exercise due diligence in executing the warrant. *People v Ortman*, 209 Mich App 251, 254–256 (1995).

C. Hearing

*A checklist for probation violation hearings is in the Appendix.

Probation violation hearings are summary and informal. The probation violation hearing procedure is governed by MCR 6.445(E).* The probationer is not entitled to a jury trial. *People v Walker*, 17 Mich App 85, 86–87 (1969); *People v Gladdis*, 77 Mich App 91, 96 (1977). Although a probation revocation hearing is not a criminal trial, the probationer is entitled to certain due process rights at that proceeding. The probationer has the right to be present at the probation violation hearing, to present evidence on his or her behalf, and to examine and cross-examine witnesses. MCR 6.445(E)(1). Only evidence relevant to the alleged violation may be considered. *Id*.

> "[D]ue process is satisfied in a probation revocation proceeding if a trial court advises a defendant of his right to counsel and the appointment of counsel, if he is indigent, and determines that there is a knowing and intelligent waiver of that right." *People v Belanger*, 227 Mich App 637, 647 (1998).

Probation revocation encompasses a two-step analysis: (1) a factual determination of whether the defendant violated the terms of his or her probation, and (2) a discretionary determination of whether the violation warrants revocation of probation. *People v Pillar*, 233 Mich App 267, 269 (1998); *People v Rocha*, 86 Mich App 497, 502 (1978). Except for those concerning privilege, the rules of evidence do not apply to probation violation hearings. MCR 6.445(E)(1); MRE 1101(b)(3). The burden of proof is a preponderance of the evidence. MCR 6.445(E)(1). Judicial findings at the conclusion of the hearing are required. MCR 6.445(E)(2).

The Fourth Amendment exclusionary rule may not apply to probation violation proceedings. See *People v Perry*, 201 Mich App 347, 349 (1993) and *People v Hardenbrook*, 68 Mich App 640, 646 (1976).

*See Section 4.13.

Due process may require a competency determination* if there is a bona fide doubt raised regarding defendant's ability to understand the nature of the proceedings against him or her and to assist counsel. *People v Martin*, 61 Mich App 102, 108–109 (1975).

"[A] judge who sentences a defendant to probation retains jurisdiction over the case in all subsequent proceedings, including revocation of probation." *People v Manser*, 172 Mich App 485, 487 (1988). "The underlying policy is simply to insure that revocation will be considered by the judge who is most acquainted with the matter." *People v Clemons*, 116 Mich App 601, 604 (1981).

Probation may not be revoked for failure to pay fines, costs, or restitution if the reason for non-payment was the defendant's indigence. *Bearden v Georgia*, 461 US 660, 664 (1983); *People v Terminelli*, 68 Mich App 635, 637-638 (1976); *People v Lemon*, 80 Mich App 737, 745 (1978).

D. Plea

With the consent of the court that granted probation, the probationer may plead guilty to the violation. MCR 6.445(F). Before accepting a guilty plea,* the court must advise the probationer that he or she is giving up the right to a contested hearing and if unrepresented by counsel, that the probationer is giving up the right to a lawyer's assistance at the hearing. MCR 6.445(F)(1). The court must also advise the probationer of the maximum possible sentence for the offense. MCR 6.445(F)(2). The court must ascertain that the plea is understanding, voluntary and knowing. MCR 6.445(F)(3). Finally, the court must establish factual support for the violation. MCR 6.445(F)(4). It is a good practice to swear the defendant before accepting the plea, but this is not specifically required by the court rule.

*A checklist and script for accepting a defendant's plea to an alleged probation violation is in the Appendix.

E. Sentencing

Violation of probation is not a crime, and a ruling that probation has been violated is not a new conviction. *People v Kaczmarek*, 464 Mich 478, 482 (2001); *People v Burks*, 220 Mich App 253, 256 (1996); *People v Johnson*, 191 Mich App 222, 226–227 (1991). Instead, revocation of probation simply clears the way for resentencing* on the original offense. MCL 771.4.

*A checklist and script for sentencing a probationer for a violation of probation is included in the Appendix.

The legislative sentencing guidelines apply to probation violation sentences. *People v Hendrick*, 261 Mich App 673, 679–680 (2004), lv gtd ___ Mich ___ (2004)

If the court concludes that the probationer is in violation of the conditions of his or her probation or if the probationer pleaded guilty to the violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration. MCR 6.445(G). A probationer may not be sentenced to prison unless the court has reviewed a current presentence report and complies with the provisions in MCR 6.425(B), (D)(2), and (D)(3). MCR 6.445(G).

If the court imposes a sentence of imprisonment, the court must give credit for time already served, including jail "good time." *People v Resler*, 210 Mich App 24, 28 (1995).

F. Appeal Rights

Immediately after imposing sentence, on the record, the court must also advise the probationer of his or her rights regarding appeal. In a case involving incarceration, if the conviction occurred after a contested hearing, the probationer has the right to appeal. MCR 6.445(H)(1)(a). If incarceration was imposed for a conviction that was the result of a guilty plea, the probationer is entitled to file an application for leave to appeal. MCR 6.445(H)(1)(b).

Immediately after imposing sentence in cases involving a sentence other than incarceration, the court must advise the probationer on the record that the probationer has the right to file an application for leave to appeal the court's finding. MCR 6.445(H)(2).

See *People v Pickett*, 391 Mich 305 (1974) on the right to appeal a probation violation sentence.

4.61 Post-Appeal Relief

MCR 6.500* *et seq.* Post-appeal relief

MCR 6.502 Motion for relief from judgment

*Subchapter 6.500 applies to convictions that occurred before the rule was adopted on October 1, 1989. *People v Jackson*, 465 Mich 390, 391 (2001).

A. Generally

A motion for relief from judgment may request relief from only one judgment. MCR 6.502(B). Additional motions are required for any other judgments from which relief is sought. *Id*. Multiple convictions arising from a single trial or plea proceeding constitute a single judgment for purposes of this rule. *Id*.

B. Initial Consideration

Subchapter 6.500 of the Michigan Court Rules establishes the procedures for pursuing post-appeal relief from a criminal conviction. The subchapter is the exclusive means to challenge a conviction in Michigan once a defendant has exhausted the normal appellate process. Relief may not be granted unless the defendant demonstrates good cause for failure to have raised the grounds for relief on appeal or in a prior motion under the subchapter and that actual prejudice resulted from the alleged irregularities that support the claim for relief. MCR 6.508(D)(3)(a) and (b); *People v Watroba*, 193 Mich App 124, 126 (1992).

The court shall promptly conduct an initial consideration of the motion and shall deny the motion if it plainly appears from the face of the motion presented that the defendant is not entitled to relief. MCR 6.504(B)(1)–(2). The order must include a concise statement of the reasons for denial. MCR 6.504(B)(2). If the motion is summarily dismissed under MCR 6.504(B)(2), the defendant may move for reconsideration within 21 days after service of the order of dismissal. MCR 6.504(B)(3).

MCR 6.508 sets out three bars to relief from judgment. The court may not grant relief if:

(1) the sentence is still subject to challenge on appeal, MCR 6.508(D)(1);

(2) the motion alleges grounds that were decided against the defendant in a prior appeal or proceeding under MCR 6.500 unless the defendant establishes that a retroactive change in the law has undermined the prior decision, MCR 6.508(D)(2); and

(3) the motion alleges grounds for relief other than jurisdictional defects, which could have been raised on appeal from the conviction or in a prior motion under MCR 6.500, MCR 6.508(D)(3). *People v McSwain*, 259 Mich App 654, 679–680 (2003).

C. Response

If the entire motion is not summarily dismissed, the court shall order the prosecuting attorney to respond and conduct further proceedings under MCR 6.505–6.508. MCR 6.504(B)(4). If the prosecutor is ordered to respond to the motion, the response must be in writing and must include copies of any transcripts or briefs not in the court's file.

D. Right to Counsel

The court may appoint counsel if the defendant is indigent and has requested counsel. The court must appoint counsel if the court orders that an evidentiary hearing or oral argument be held. MCR 6.505(A). A defendant cannot claim that he or she was deprived of the effective assistance of counsel at a proceeding under MCR 6.500 *et seq.*, because there is no constitutional right to counsel in post-conviction proceedings. *People v Walters*, 463 Mich 717, 720 (2001).

E. Relief

If the defendant's motion is not denied under MCR 6.504(B)(2), the court may require the parties to expand the record by providing additional materials the court deems relevant to its decision on the merits of the matter. MCR 6.507(A). Copies of any items submitted to expand the record must be served on the opposing party. MCR 6.507(B).

MCR 6.508* governs the procedure for disposing of the motion with or without conducting an evidentiary hearing. If an evidentiary hearing is necessary, the court should conduct one as promptly as possible. MCR 6.508(C). Except for those regarding privilege, the rules of evidence do not apply to the hearing. MCR 6.508(C). A verbatim record must be made of the hearing. *Id*.

*Substantial amendments to MCR 6.508 have been proposed. The amendments address a defendant's entitlement to relief and time limitations for filing a motion for relief from judgment.

F. Standard of Review

The decision to grant relief from judgment is reviewed for an abuse of discretion, and the trial court's findings of fact in support of its ruling are

reviewed for clear error. *McSwain*, *supra*, 259 Mich App at 681; *People v Ulman*, 244 Mich App 500, 508 (2001).

4.62 Expungement

MCL 780.621 Motion to set aside conviction

A. Eligible Offenses

After five years, a single felony conviction can be expunged by motion under MCL 780.621(3). Offenses or attempts to commit offenses for which the maximum punishment is life imprisonment, CSC-II, CSC-III, assault with intent to commit CSC involving penetration, and traffic offenses cannot be set aside. MCL 780.621(2); *People v Jones*, 217 Mich App 106, 108 (1996).

A person must have only one conviction to be eligible for expungement. *People v McCullough*, 221 Mich App 253, 254 (1997). This provision applies to both felonies and misdemeanors. *People v Grier*, 239 Mich App 521, 522–523 (2000).

Where a state granted a defendant a full and unconditional pardon for five misdemeanor offenses he committed in that state, the Michigan court improperly ruled that the defendant was not eligible for expungement of a 1979 conviction in Michigan. *People v Vanheck*, 252 Mich App 207, 217 (2002).

B. Procedure

The motion to set aside a conviction must contain the information required by MCL 780.621(4) and be served as provided by MCL 780.621(5)–(7).

SCAO has approved forms for the Application to Set Aside Conviction (MC 227) and Order on Application to Set Aside Conviction (MC 228) which contain the required statutory provisions. Copies must be served on the prosecutor's office, the Michigan State Police, and the Attorney General. MCL 780.621(5), (6), and (7).

SCAO requests that hearings on the motion not be scheduled sooner than 60 days from the date the application is filed with the court. SCAO Administrative Memorandum, 2004-12. The court shall not act upon the application until the Department of State Police reports the information required to the court. MCL 780.621(5).

Individuals convicted as sex offenders must still register even after the conviction is expunged. MCL 28.722(a)(*i*).

MCR 3.925 governs the procedure for setting aside juvenile convictions and adjudications.

An expungement does not completely wipe out all records of the conviction. The state police will retain a non-public record of the case, but the general public will not have access to the information. MCL 780.623.

C. Standard of Review

Assuming the statutory requirements are met, the decision on an expungement motion is reviewed for an abuse of discretion. *People v Link*, 225 Mich App 211, 216 (1997).

Part VII—Rules Governing Particular Types of Offenses

4.63 Aiding and Abetting

MCL 767.39 Abolition of distinction between accessory and principal

CJI2d 8.1–8.7 Criminal jury instructions: Aiding and abetting; accessory after the fact

A. Statute

Every person involved in the commission of an offense may be prosecuted, indicted, tried, and if convicted shall be punished as if he or she had directly committed the offense. MCL 767.39. A person is involved in the offense's commission if he or she procures, counsels, aids, or abets in its commission. *Id*.

> "The phrase 'aiding and abetting' describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime [internal citations omitted]." *People v Rockwell,* 188 Mich App 405, 411–412 (1991), quoting *People v Vicuna*, 141 Mich App 486, 495–496 (1985).

B. Elements

> "A defendant may be charged as a principal but convicted as an aider and abettor. To support a finding that a defendant aided and abetted a crime, the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted

> the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime [internal citations omitted]." *People v Turner*, 213 Mich App 558, 568–569 (1995).

See also *People v Mass*, 464 Mich 615, 627 (2001), where the Michigan Supreme Court clarified that the level of intent necessary to convict an individual as an aider and abettor was no greater than the level of intent necessary to convict a principal for the same crime. See *People v Moore*, 470 Mich 56, 63–69 (2004) for case summary clarifying the components of aiding and abetting felony-firearm.

C. Guilt of Principal

> "To sustain an aiding and abetting charge, the guilt of the principal must be shown. However, the principal need not be convicted. Rather the prosecutor need only introduce sufficient evidence that the crime was committed and that the defendant committed it or aided and abetted it [internal citations omitted]." *Turner*, *supra*, 213 Mich App at 569.

4.64 Attempts

MCL 750.92 Attempt to commit crime

CJI2d 9.1 Attempt

A. Statute

> "Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same . . . shall be punished[.]" MCL 750.92.

Attempt is a separate, substantive offense punishable under its own statute. *People v Johnson*, 195 Mich App 571, 575 (1992).

B. Elements

The elements of attempt are: (1) the defendant specifically intended to commit the crime attempted; and (2) the defendant took some overt action beyond mere preparation toward committing the alleged crime but failed to complete the crime. *People v Harding*, 163 Mich App 298, 324 (1987), vacated in part on other grounds 430 Mich 859 (1988). CJI2d 9.1.

> "Mere preparation is distinguished from an attempt in that the former consists of making arrangements or taking steps necessary for the commission of a crime, while the attempt itself consists of some direct movement toward commission of the crime that would lead immediately to the completion of the crime. *People v Jones*, 443 Mich 88, 100 (1993).

1. Impossibility

Whether it would be impossible for the defendant to have committed the complete offense is irrelevant to whether a defendant may be convicted of attempt.

> "Rather, the trier of fact must examine the unique circumstances of the particular case and determine whether the prosecution has proven that the defendant possessed the requisite specific intent and that he engaged in some act 'towards the commission' of the intended offense." *People v Thousand*, 465 Mich 149, 166 (2001).

2. Abandonment

Voluntary abandonment is an affirmative defense to a prosecution for criminal attempt, even where the abandonment occurs after an overt act constituting attempt. *People v Kimball*, 109 Mich App 273, 279–287 (1981).

The burden is on the defendant to establish by a preponderance of the evidence that he or she had voluntarily and completely abandoned his or her criminal purpose. *People v Cross*, 187 Mich App 204, 206 (1991).

C. Jury Instruction

A trial court has the discretion, without the request of either party, to instruct the jury on attempt to commit the offense charged. *Adams, supra*, 416 Mich at 60. The court is required to instruct on attempt where the defense offered at trial is that there was only an attempt and evidence is presented that the completed offense may not have been committed or that the jury should not believe evidence that the offense charged was completed.* *Adams*, *supra*, 416 Mich at 60.

*See Section 4.48.

A trial court need not instruct a jury on attempt to commit the offense charged because even though the completed offense may necessarily include conduct which, taken alone, would be an attempt, the elements of an attempt are not duplicated in the completed offense. *People v Adams*, 416 Mich 53, 56 (1982). In other words, an attempt is not a necessarily lesser included offense as explained in *Cornell, supra*.*

D. Penalty

MCL 750.92 provides for three levels of punishment:

- if the offense attempted is punishable by death, conviction of the attempted offense is a felony punishable by not more than ten years of imprisonment. MCL 750.92(1).
- if the offense attempted is punishable by more than five years of imprisonment, conviction of the attempted offense is a felony punishable by not more than five years in prison or not more than one year in the county jail. MCL 750.92(2).
- if the offense attempted is punishable by less than five years of imprisonment, or imprisonment in the county jail, or a fine, conviction of the attempted offense is a misdemeanor punishable by up to two years in prison, or up to one year in the county jail, or a fine of not more than $1,000.00. MCL 750.92(3).

Any prison sentence imposed under MCL 750.92 shall not exceed one-half of the greatest punishment that might have been imposed for the completed offense. MCL 750.92(3); *People v Loveday*, 390 Mich 711, 712–716 (1973).

4.65 Conspiracy

MCL 750.157a Conspiracy to commit offense or legal act in illegal manner; penalty

CJI2d 10.1 Conspiracy and solicitation

A. Statute

MCL 750.157a provides, in part:

> "Any person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy[.]"

B. Elements

The elements of the crime of conspiracy are (1) an agreement, express or implied, between two or more persons; (2) to commit an illegal act; or (3) to commit a legal act in an illegal manner. *People v Ayoub,* 150 Mich App 150, 153 (1985).

> "Conspiracy is defined by common law as 'a partnership in criminal purposes . . . .' Under such a partnership, two or more individuals must have voluntarily agreed to effectuate the commission of a criminal offense [footnotes and internal citations omitted]." *People v Justice (After Remand)*, 454 Mich 334, 345 (1997), quoting *United States v Kissel*, 218 US 601, 608 (1910).

1. Specific Intent

The participants in a conspiracy must specifically intend to work together in furtherance of their agreed upon criminal purpose. *Justice*, *supra,* 454 Mich at 346, 352. This element of specific intent is crucial to establishing the crime of conspiracy because "the crime [of conspiracy] is complete upon the formation of the agreement" to act unlawfully or pursue a lawful end in an unlawful manner. *Justice, supra* at 345–346, quoting *People v Carter*, 415 Mich 558, 568 (1982). Therefore, there must be proof that the conspirators had the specific intention of promoting, advancing, or pursuing an unlawful objective. *Justice*, *supra* at 347.

2. Evidence of the Conspiracy

Generally, the conviction of a co-conspirator is inadmissible in the separate trial of another member of the conspiracy. *People v Bart (On Remand)*, 220 Mich App 1, 15 (1996), citing *People v Lytal*, 415 Mich 603, 612 (1982).

3. Statements of a Co-Conspirator

The Michigan Rules of Evidence allow a statement made by a co-conspirator* to be admitted as an admission by another conspirator when the statement of the co-conspirator was made "during the course and in furtherance of the conspiracy." MRE 801(d)(2)(E). See *Ayoub*, *supra,* 150 Mich App at 153. However, in order for the statement of the co-conspirator to be admissible, there must first be independent proof of the conspiracy. MRE 801(d)(2)(E). The question of whether there is sufficient independent proof of the conspiracy is a determination left to the trial judge and the determination must be made prior to the introduction of the statement. *People v Vega*, 413 Mich 773, 778–780 (1982).

*See Section 4.41 for more information.

C. Jury Instructions

According to CJI2d 4.2 (instruction regarding the admissibility of a codefendant's confession or statement), a codefendant's statement can only

*See Section 4.48.

be used against the codefendant. In *Bruton v United States,* 391 US 123, 126 (1968), the Supreme Court ruled that the Confrontation Clause of the Sixth Amendment forbids use of a codefendant's statement unless the codefendant testifies and is available for cross-examination.*

According to the *Use Note* under CJI2d 4.2, statements by a co-conspirator during the course of and in the furtherance of a conspiracy are admissible against all conspirators upon a prima facie showing of the conspiracy. MRE 801(d)(2)(E). Under such circumstances, CJI2d 4.2 should not be used.

4.66 Controlled Substances

MCL 333.7101 *et seq.* Controlled substances act

CJI2d 12.1 *et seq.* Narcotics

A. Statutory Definitions

Generally, it is a crime to manufacture, deliver, possess or use a controlled substance. MCL 333.7401 *et seq.*

"Controlled substance" is defined at MCL 333.7104(2) and MCL 333.7201 *et seq.*

"Deliver" is defined at MCL 333.7105(1) as "the actual, constructive, or attempted transfer from 1 person to another of a controlled substance." This definition does not require a sale and would include the social sharing of a controlled substance. See *People v Brown*, 163 Mich App 273, 296–297 (1987), which held the "personal use" exception of MCL 333.7106(2)(b) does not apply to growing marijuana.

"Possession" does not have a statutory definition. A definition found at CJI2d 12.7 summarizes the definitions found in case law:

> "The term 'possession' connotes dominion or the right to control over the drug with knowledge of its presence and character. *People v Mumford*, 60 Mich App 279, 282 (1975).
>
> "Possession of a controlled substance requires that the alleged possessor was aware of the presence and character of the particular substance and was intentionally and consciously in possession of it. *People v Delongchamps*, 103 Mich App 151, 159 (1981).
>
> "A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive. Likewise, possession may be found even when the defendant is not the owner of recovered narcotics.

> Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance.
>
> * * *
>
> "It is well established that a person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown [internal citations omitted]." *People v Wolfe*, 440 Mich 508, 519–520 (1992).

One can constructively possess a controlled substance through an agent. *People v Konrad*, 449 Mich 263, 274 (1995).

The possession of minute amounts is sufficient to support a conviction, if there are other facts and circumstances from which knowledge can be inferred. See *People v Herrington*, 396 Mich 33, 49 (1976); *People v Vaughn*, 200 Mich App 32, 37 (1993); *People v Hunten*, 115 Mich App 167, 171 (1982).

"Possession with intent to deliver."

> "Just as proof of actual possession of narcotics is not necessary to prove possession, actual delivery of narcotics is not required to prove intent to deliver. Intent to deliver has been inferred from the quantity of narcotics in a defendant's possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest." *People v Wolfe,* 440 Mich 508, 524 (1992).

Intent can "be inferred from the amount of controlled substance possessed." *People v Ray*, 191 Mich App 706, 708 (1991).

A defendant's knowledge of the amount of controlled substance in his or her possession is not an element of a possession with intent to deliver conviction. *People v Marion*, 250 Mich App 446, 450–451 (2002).

B. Drug Profile Evidence

So-called "drug profile" evidence is not admissible as substantive evidence of guilt, but with a cautionary instruction, such evidence may be admissible to help the factfinder understand the evidence.* See *People v Murray*, 234 Mich App 46, 52–55 (1999); *People v Hubbard*, 209 Mich App 234, 239–241 (1995).

*See Chapter 2, Section 2.36 on police testimony about drugs.

The following cautionary instruction is modeled on *People v Murray, supra*:

"You have heard police officers' testimony about their experience in other drug cases. You are cautioned that the testimony concerning what happened in their other drug cases is not to be used to decide whether any crime was committed in this case. The testimony that they gave concerning other drug cases was received only for background informational purposes and nothing else."